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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

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AMERICAN STATE REPORTS.

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AMERICAN STATE REPORTS.
VOL. LXXVIII.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

JOHNSON v. GOODYEAR MINING COMPANY.

[127 California, 4.]

CORPORATIONS—"PERSON."—If constitutional provisions guarantee to "persons" the enjoyment of property, or afford to them means for its protection, or prohibit legislation injuriously affecting it, the benefits of such provisions extend to corporations, and the courts may always look beyond the name of the artificial being to the individuals whom it represents.

CONSTITUTIONAL LAW — CORPORATIONS — SPECIAL LEGISLATION.—A statute attempting to regulate the contracts of a corporation respecting the wages of its employes, and establishing liens on all of the property of a corporation therefor, is special and arbitrary legislation against the corporation and in favor of the laborer. It infringes the right to make and enforce contracts, and denies to corporations the equal protection of law, and is unconstitutional and void.

CONSTITUTIONAL LAW — CORPORATIONS — SPECIAL LEGISLATION—ARBITRARY CLASSIFICATION.—Corporations cannot be made the basis of classification for purposes of legislation, unless such classification is founded upon some constitutional or natural distinction suggesting a reason justifying the diversity of legislation respecting them. Arbitrary selection is not justified by calling it classification, and there is no reason why a corporation should have its property subjected to a lien unless the property of other persons, under like circumstances, is subject to the same kind of lien, or why it should be prohibited from making defenses which others may make. A statute requiring corporations to pay attorneys' fees in an action from which others are exempt, and forbidding them and their employes from making contracts which others may make, is unconstitutional.

CONSTITUTIONAL LAW — CORPORATIONS — SPECIAL LEGISLATION.—Statutes restricting the contracts or business of foreign corporations cannot be upheld to the extent of altering, amending, or repealing their charters existing under the laws of other states.

F. R. Wehe, for the appellants.

F. D. Soward, for the respondent.

§ COOPER, C. This action was brought to recover from the corporation defendant for labor performed by plaintiff and for labor performed by others for defendant corporation, whose claims have been assigned to plaintiff. Judgment was entered in favor of plaintiff, and defendants appeal. The case comes here on the judgment-roll. The findings show that the defendant corporation, while engaged in business in Sierra county, California, became indebted to plaintiff and some twenty others, who before the commencement of this action assigned their claims to plaintiff, for labor performed by the month at the instance of defendant corporation in its quartz mine in said county, and the same has not been paid. That four hundred dollars is a reasonable attorney's fee to be allowed to plaintiff for the prosecution of the action. As conclusions of law, the court found that plaintiff was entitled to judgment against defendant corporation for the sum of five thousand and thirty-nine dollars and fifty-seven cents and for four hundred dollars attorneys' fees, and that the same is a first lien upon all the property described in the complaint, consisting of certain real estate, mining claims, and personal property, consisting of mining materials, tools, engines, cars, wood, lumber, merchandise for mining, etc., and that all the said property, or so much thereof as might be necessary, be sold to pay the plaintiff's judgment, costs, and attorneys' fees. Judgment was accordingly entered. The action was brought to recover monthly wages and attorneys' fees, and to have the amount declared a lien upon the property of the defendant corporation under an act approved March 29, 1897: Stats. 1897, p. 231. As the constitutionality of the act is the main question in controversy here, it will be necessary to give the sections of the act herein discussed in full. The sections material are as follows:

"Section 1. Every corporation doing business in this state shall pay, at least once a month, each and every employé employed by such corporation, in transacting or carrying on its business, or in the performance of labor for it, the wages earned

by such employé during the preceding month; provided, however, that if at the time of payment any employé shall be absent, or not engaged in his usual employment, he shall be entitled to said payment at any time thereafter upon demand.

“Sec. 2. A violation of any of the provisions of section 1 of this act shall entitle each of the said employés to a lien on all the property of said corporation for the amount of their wages, which lien shall take preference over all other liens, except duly recorded mortgages or deeds of trust; and in any action to recover the amount of such wages, or to enforce said lien, the plaintiff shall be entitled to a reasonable attorney’s fee, to be fixed by the court, and which shall form part of the judgment in said action, and shall also be entitled to an attachment against said property. An unrecorded deed shall be no defense to such actions.

“Sec. 3. That on the trial of any action against such corporation for a violation of the provisions of this act, such corporation shall not be allowed to set up any defense for a failure to pay monthly any employé engaged in transacting or carrying on its business the wages earned by such employé during the preceding month, other than the fact that such wages were not earned, except a valid assignment of such wages, a setoff or counterclaim against the same, or the absence of such employé from his usual employment at the time of the payment of the wages so earned by him. . . .

“Sec. 5. No corporation shall require, and no employé of such corporation shall make, any agreement to accept wages at longer periods than as provided in this act as a condition of employment.

“Sec. 6. All wages earned by any employé engaged in the service of any corporation in this state shall be paid in lawful moneys of the United States, or in checks negotiable at face value on demand.

“Sec. 7. Any corporation violating any of the provisions of this act shall be subject to a fine not exceeding one hundred dollars, or less than fifty dollars, for each violation, the same to be imposed by any court in this state having jurisdiction of offenses in which the penalty does not exceed a fine of one hundred dollars; said fine to be paid, by the judge or magistrate before whom a recovery may be had under the provisions of this act, into the general fund of the treasury of the county in which said conviction may be had.”

The plaintiff claims the benefit of the provisions of said act applicable to this case, and the defendants contest the said provisions and every part of said act as being unconstitutional. The statute is said to contravene the following provisions of the constitution of the state: 1. "No person shall be deprived of life, liberty, or property without due process of law": Const., art. 1, sec. 1, subd. 13; 2. "Nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens": Const., art. 1, sec. 1, subd. 21; 3. "All laws of a general nature shall have a uniform operation": Const., art. 1, sec. 1, subd. 11; 4. Section 25, article 4, providing that the legislature shall not pass local or special laws in the following cases: "3. Regulating the practice of courts of justice; . . . 24. Authorizing the creation, extension, or impairing of liens; . . . 33. In all other cases where a general law can be made applicable"; 5. Fourteenth amendment to the constitution of the United States: "Nor shall any state deny to any person within its jurisdiction the equal protection of the laws." In the decision of this case the constitutionality of the sections of the statute herein set forth is necessarily involved, and it is with a deep sense of the importance of the subject that we enter upon its discussion. We must determine whether the law-making power of the state has in this instance gone beyond the limits of the constitution adopted by the people. This is always a question of great delicacy and one which this court approaches with reluctance, but one in which the duty of the court is plain and which must be met squarely when presented. The same constitution that lays down the fundamental law of our state and prohibits legislatures from going outside the powers and limitations therein contained created the courts, and provided that they should stand as the guardians of the people and lay their restraining hands upon the legislature in all cases where it has plainly violated the provisions of the people's charter of rights.

⁸ It will be observed that the act in question applies only to two classes of persons: 1. Corporations doing business in this state, and not to corporations of any other class; 2. To laborers performing labor for such corporations. It does not apply to the thousands of laborers who may be employed by individuals or copartnerships in the many and varied industries of the state. The word "corporation" in the act means those artificial persons created and existing under the laws of this or some other state; but the word "corporation," as to the rights

of defendants, must be treated as though it means the name of all the individuals who are members of the corporation. It has long been settled that the word "person," within the meaning of the fourteenth amendment to the constitution of the United States applies to a corporation: *Douglass v. Pacific etc. S. S. Co.*, 4 Cal. 306; *Pasadena v. Stimson*, 91 Cal. 248; *Santa Clara County v. Southern Pac. R. R.*, 118 U. S. 394; *Pembina Min. Co. v. Pennsylvania*, 125 U. S. 181, 189; *Missouri Pac. Ry. v. Mackey*, 127 U. S. 205; *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 154.

The rule is admirably stated in the *Railway Tax Cases*, 13 Fed. Rep. 743, as follows: "Private corporations are, it is true, artificial persons, but, with the exception of a sole corporation, with which we are not concerned, they consist of aggregations of individuals united for some legitimate business. In this state, they are formed under general laws, and the Civil Code provides that they 'may be formed for any purpose for which individuals may lawfully associate themselves.' Any five or more persons may, by voluntary association, form themselves into a corporation. And, as a matter of fact, nearly all enterprises in this state requiring for their execution an expenditure of large capital are undertaken by corporations. It would be a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states should cease to exert such protection the moment the person becomes a member of a corporation. We cannot accept such a conclusion. On the contrary, we think it is well established by numerous adjudications of the supreme courts of the several states that whenever a provision of the constitution or of a law guarantees to persons the enjoyment of ⁹ property, or affords to them means for its protection, or prohibits legislation injuriously affecting it, the benefits of the provision extend to corporations, and that the courts will always look beyond the name of the artificial being to the individuals whom it represents."

The case was afterward taken to the supreme court of the United States (*Railway Tax Cases*, 118 U. S. 396), and on the opening of court, before argument, the chief justice said: "The court does not wish to hear argument on the question whether the provision in the fourteenth amendment to the constitution which forbids a state to deny to any person within its jurisdiction the equal protection of the laws applies to these corporations. We are all of opinion that it does." In discussing the

provisions of the statute in question it will, therefore, be regarded as settled that the word "corporation" refers to the members who constitute the corporation, and that the rights of a corporation are to be measured by the same laws as the rights of a person. The law should be made for all alike, for the rich as well as the poor, for the corporation as well as the laborer. In Cooley on Constitutional Limitations, sixth edition, page 483, it is said: "But everyone has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plow. This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments." In Wally v. Kennedy, 2 Yerg. 554, 24 Am. Dec. 511, it is said: "The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic, or land, under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals and ¹⁰ corporations would be governed by one law, the mass of the community and those who made the law by another, whereas the like general law affecting the whole community equally could not have been passed." Applying these principles to this act, it is clearly unconstitutional. It gives a first lien to laborers for the amount due them from corporations doing business in this state upon all the real and personal property of such corporations, and does not even require any description of the property or notice in any manner in order to make such lien valid. It seems to give the laborer the right to an attachment against the property of the corporation without requiring him to make the affidavit and file the undertaking required of all other persons in order to procure such attachment. It does not give this lien to any other class of laborers. The thousands of laborers for individuals or copartnerships in the like employment do not have the benefit of it. The laborer toiling at the same kind of labor, felling the forest, tilling the soil, or dig-

ging in the bowels of the earth, has no such lien if he is not working for a corporation doing business in this state. The lien attaches to the property of such corporation, but not to the property of an individual under precisely the same circumstances. Under general law, liens are given to all mechanics, artisans, laborers, or materialmen, and against all persons and corporations. Under the present statute, a lien is given to laborers performing labor for the particular corporations named. All other persons in the state, after obtaining an ordinary money judgment, must enforce it by the writ of execution, but laborers for such corporations under this statute have the right to have the court declare the amount found due them a lien on all the property of the corporation, which shall take preference over all other liens except recorded mortgages and deeds of trust. The grocer who, perhaps, has furnished the corporation the food with which the laborer has fed his wife and children may have attached the property of the corporation for the purpose of securing himself, but the laborer's lien by the mighty hand of this statute at once sweeps it away. The materialman or contractor who has furnished the material for or constructed a building for the corporation, and who has filed his notice of lien as provided in the Code of Civil Procedure, and who may have secured a judgment ¹¹ thereon, must stand by and see his lien destroyed by a decree of court in favor of laborers who performed labor for the corporation since his lien attached. The judgment creditor who has procured a judgment and had it regularly docketed, and who is resting securely under the provisions of the Code of Civil Procedure of this state making his judgment a lien upon all the real estate of the judgment debtor, is surprised to find his lien destroyed by a decree in favor of one who has performed labor for the corporation long since his lien attached. The corporation may have delivered a large amount of personal property by way of pledge to secure a loan, and the money may have been used in paying the laborers employed by the corporation, and yet, under this statute, the court must declare the amount due laborers a prior lien as against the pledgee who has actual possession of the property pledged. The statute gives the laborer a right, in case he recovers judgment, to recover attorneys' fees, which become a part of the judgment. No other class of laborers or persons are given the right to recover attorneys' fees except by virtue of a contract or by virtue of a general statute. The corporation is prohibited from setting up any defense to

the action except some two or three. Matters which might be pleaded as a defense by all other persons in the state are not allowed to be so pleaded by the corporation. If the legislature could deprive the corporation of some of the defenses which other litigants on like terms are allowed, it could, by a Draconian edict, deprive it of all of them and say at once that the corporation should make no defense whatever to the action. The corporation and the laborer are prohibited from making any contract whereby wages are to become due for a longer period than one month as a condition of employment, or by which the laborer is to be paid in anything except money or negotiable checks. The working man of intelligence is treated as an imbecile. Being over twenty one years of age, and not a lunatic or insane, he is deprived of the right to make a contract as to the time when his wages shall become due. Being of sound mind and knowing the value of a horse, he is not allowed to make an agreement with the corporation that he will work sixty days and take the horse in payment. Business might be such that a corporation could not possibly pay wages without ¹² getting laborers who were willing to wait for their wages until the corporation could get money with which to pay them by marketing its products. The laborer might be interested in the corporation, or for some reason willing to wait until the corporation could pay him. Yet the parties, being able to contract and willing to contract, and desiring for the good of each other to contract, are by this statute forbidden to do so. Not only this, but the corporation shall be subject to a fine of not less than fifty dollars for each violation of the statute. A corporation employing a thousand men and sued by each could not defend the suits without being limited in its defenses to those named in the statute, and being subject to a reasonable attorney's fee in each case. In case it made a contract with the thousand men by which they agreed to work for it three months for one hundred dollars each, they could bring suit and recover before the end of the three months and each recover an attorney's fee, making a thousand attorneys' fees, and the corporation would be subject to one thousand fines of one hundred dollars each, making the modest sum of one hundred thousand dollars in fines, or perhaps the magistrate might in his discretion make the fine fifty dollars in each case and thus reduce it to fifty thousand dollars. We might enumerate many other infirmities in the statute, but the above are sufficient to destroy it. It is probably unnecessary in this opinion to discuss sep-

arately the constitutional objections herein briefly pointed out. In *Ex parte Kuback*, 85 Cal. 275, 20 Am. St. Rep. 226, it appeared that the petitioner had been arrested for the violation of an ordinance of the city of Los Angeles making it a misdemeanor for any contractor to make any agreement to pay any laborer for any labor in excess of eight hours in any one day. This court, in discharging the petitioner, said: "It is claimed in support of the petition that this ordinance was unconstitutional and void. We think this objection is well taken. It is simply an attempt to prevent certain parties from employing others in a lawful business and paying them for their services, and is a direct infringement of the right of such persons to make and enforce their contracts. If the services to be performed were unlawful or against public policy, or the employment were such as might be unfit for certain persons, as, for example, females ¹³ or infants, the ordinance might be upheld as a sanitary or police regulation, but we cannot conceive of any theory upon which a city could be justified in making it a misdemeanor for one of its citizens to contract with another for services to be rendered because the contract is that he shall work more than a limited number of hours per day." Statutes similar to the one under discussion have been frequently passed by the legislatures of sister states and as frequently declared unconstitutional by the courts. The legislature of Pennsylvania, in June, 1881, passed what was known as the "store order act," and under its provisions all laborers employed by firms, corporations, or persons engaged in the business of manufacturing must be paid in cash and can make no agreement by which their labor shall be paid for in any goods or store orders.

The supreme court of the state in *Godcharles v. Wigeman*, 113 Pa. St. 437, held the act unconstitutional and in the opinion said: "The first, second, third, and fourth sections of the act of June 29, 1881 are utterly unconstitutional and void, inasmuch as by them an attempt has been made by the legislature to do what in this country cannot be done; that is, to prevent persons who are *sui juris* from making their own contracts. The act is an infringement alike of the right of the employer and the employé; more than that, it is an insulting attempt to put the laborer under a legislative tutelage which is not only degrading to his manhood but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law that proposes to

prevent him from so doing is an infringement of his constitutional privileges and consequently vicious and void."

In 1887, the legislature of the state of West Virginia passed an act declaring that all persons engaged in mining coal or other minerals, or in manufacturing them, should not issue for the payment of labor certain orders therein described. The supreme court of the state in *State v. Goodwill*, 33 W. Va. 179, 25 Am. St. Rep. 863, declared the law unconstitutional and in the opinion said: "The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the ¹⁴ poor man lies in the strength and dexterity of his own hands and to hinder him from employing these in what manner he may think proper, without injury to his neighbor, is a plain violation of this most sacred property. It is equally an encroachment both upon the just liberty and rights of the workman and his employer, or those who might be disposed to employ him, for the legislature to interfere with the freedom of contract between them, as such interference hinders the one from working at what he thinks proper, and at the same time prevents the other from employing whom he chooses. . . . But we are aware of no well-considered case in which a statute has been upheld that undertook to regulate the dealings between employer and employé, even in this class of occupations; much less in cases that are not impressed with a public trust or duty." This case was immediately followed by *State v. Fire Creek etc. Co.*, 33 W. Va. 188, 25 Am. St. Rep. 891, in which, on the same reasoning, a statute of the state making it unlawful for any person, firm, or corporation engaged in mining or manufacturing to sell goods to any employé at a greater per cent profit than like goods are sold to others was held unconstitutional. In the opinion it is said: "That it is an attempt to do for private citizens, under no physical or mental disabilities, what they can best do for themselves, is apparent. It selects miners and manufacturers as a class, and denies to them privileges which are not only proper and legitimate in themselves, but also to some extent necessary and unavoidable in the conduct of business; privileges which concern private affairs solely, and which are enjoyed by all other classes of citizens." The general assembly of Massachusetts passed an act providing that no employer should impose a fine upon or withhold the wages of an employé engaged in weaving, for imperfections that may arise during the process of weaving. This act was pro-

nounced unconstitutional in an able opinion of the supreme court of the state: *Commonwealth v. Perry*, 155 Mass. 117, 31 Am. St. Rep. 533.

The Revised Statutes of Missouri in 1889 made it unlawful for any corporation, firm, or person engaged in mining to issue in payment of wages any order or check payable otherwise than in money unless the same was negotiable or redeemable at its face value in cash or goods at the option of the holder. The supreme ¹⁵ court of the state, in *State v. Loomis*, 115 Mo. 307, held the statute unconstitutional. The legislature of the state of Illinois in 1883 passed a statute requiring that owners and operators of coal mines in the state should weigh the coal at the mines, and that all contracts with laborers by which the weighing of coal at the mines shall be dispensed with shall be void. The statute was held unconstitutional in *Millett v. People*, 117 Ill. 295, 57 Am. Rep. 869. The same rule has been followed by the same court in regard to similar statutes as to "truck stores": *Frorer v. People*, 141 Ill. 171; as to an act for the weekly payment of wages by corporations: *Braceville Coal Co. v. People*, 147 Ill. 66, 37 Am. St. Rep. 206.

The legislature of Texas provided by statute that a railroad company refusing to pay an employé within fifteen days after demand shall be liable to such employé in a sum equal to twenty per cent on the amount due. The statute was held unconstitutional: *San Antonio etc. Ry. Co. v. Wilson* (Tex. App., June 15, 1892), 19 S. W. Rep. 910. In the opinion it is said: "If the legislature desires to interfere at all in the enforcement of labor claims, it must do so by laws equal in their operation, and protecting alike the interest of the employer and employé, for the law knows no favorites."

The supreme court of Nebraska, in *Atchison etc. R. R. Co. v. Baty*, 6 Neb. 37, 29 Am. Rep. 356, held unconstitutional a statute of 1867 giving to owners of livestock double the value of such property injured or destroyed on a railroad track.

In Michigan, a statute was passed in 1885 authorizing the taxing of an attorney's fee of twenty-five dollars in actions against a railroad company for damages for cattle killed, and the supreme court of the state held it unconstitutional: *Wilder v. Chicago etc. Ry. Co.*, 70 Mich. 382. And the supreme court of Arkansas held a similar statute of that state unconstitutional: *St. Louis etc. Ry. v. Williams*, 49 Ark. 492; and the same ruling was made on a similar statute by the supreme court of the state of Washington: *Joliffe v. Brown*, 14 Wash. 155,

53 Am. St. Rep. 868; and by the supreme court of Ohio: Coal Co. v. Rosser, 53 Ohio, 12-24, 53 Am. St. Rep. 622. Cases almost without number could be cited to the same general effect. Among others, see Durkee v. Janesville, 28 Wis. 464, 9 Am. Rep. 500; Grand ¹⁰ Rapids Chair Co. v. Runnells, 77 Mich. 104; South & North Alabama R. R. Co. v. Morris, 65 Ala. 193; Chicago etc. R. R. Co. v. Moss, 60 Miss. 641-652; Denver etc. Ry. Co. v. Outcalt, 2 Colo. App. 395.

This court in Bank held that a statute of the state prohibiting bakers from following their vocation between the hours of 6 o'clock P. M. on Saturdays and 6 o'clock P. M. on Sundays was a special law and void: Ex parte Westerfield, 55 Cal. 551, 36 Am. Rep. 47. And the same was held as to a similar statute in relation to barbers: Ex parte Jentzsch, 112 Cal. 469.

The question is very ably considered and would seem to be finally put to rest by the supreme court of the United States in Gulf etc. Ry. Co. v. Ellis, 165 U. S. 150. The statute of the state of Texas allowing owners of stock killed by a railway corporation ten dollars attorneys' fees as additional costs was held unconstitutional. In the opinion it is said: "The act singles out a certain class of debtors and punishes them, when for like delinquencies it punishes no others. They are not treated as other debtors or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorneys' fees of the successful plaintiff; if it terminates in their favor, they recover no attorneys' fees. . . . They do not stand equal before the law. They do not receive its equal protection." The reasoning of the highest court in the land in the case cited applies to this case. There is no reason why a different rule as to defenses that may be pleaded and proven and as to the nature of the lien of a judgment should obtain against a corporation than that which applies to other litigants. In Cullen v. Glendora Water Co., 113 Cal. 503, it was held that a part of the fourth section of the act generally known as the Wright act, which provided that, in a proceeding to confirm the organization and bonds of an irrigation district, "a motion for a new trial must be made upon the minutes of the court," was a special law regulating the practice of courts of justice and unconstitutional. In Pasadena v. Stimson, 91 Cal. 238, it was held that section 870 of the municipal corporation act of 1883, requiring cities of the fifth and sixth classes to make an effort to agree before instituting condemna-

tion ¹⁷ proceedings, was unconstitutional. And so in the late case of *Tulare v. Hevren*, 126 Cal. 226, this court held that that portion of the general act of the state in regard to municipal corporations, by which it is provided that in municipal corporations of the fifth class courts shall take judicial notice of all ordinances of the municipality, was unconstitutional. It is claimed that corporations are a class and that classifications can be made, and that a law is not unconstitutional if it affects all of a class. While this is true, yet the classification must be founded upon differences either defined by the constitution or natural, or which will suggest a reason which might naturally be held to justify the diversity of legislation: *Darcy v. Mayor etc.*, 104 Cal. 645; *State v. Hammer*, 42 N. J. L. 439; *Cooley on Constitutional Limitations*, 6th ed., 484. Arbitrary selection can never be justified by calling it classification: *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 159. In this case there can be no reason why a corporation doing business in this state should have its property subjected to a lien, unless the property of other persons in the state under like circumstances is subject to the same kind of a lien, or why such corporations should be prohibited from making defenses which all other persons in the state may make, or why such corporations should pay attorneys' fees or fines in an ordinary action at law while all other persons under like circumstances are exempt from such attorneys' fees and fines, or why such corporation cannot create valid liens upon its property other than by a deed or mortgage duly recorded while all other persons in the state may do so, or why such corporations shall be denied the privilege of making a contract as to the manner of payment of its employes while all other persons in the state who are over twenty-one years of age and not incompetent may do so, or why laborers cannot make a valid contract as to the time when their wages shall become due, or the kind of property or money in which they shall be paid. It is said that corporations being the creatures of the state, and deriving their powers from their charters, the same power that created them may alter or amend their charters or deprive them of rights originally given them. This is true as to certain purposes, but the legislature cannot, after creating a corporation and while it exists, deprive ¹⁸ it of the rights guaranteed to it by the federal constitution, nor deprive it of its right to resort to the courts of law, nor take its property without due process of law, nor subject it to unequal and oppressive burdens, nor deprive it of the equal pro-

tection of the laws: Maine etc. R. R. Co. v. Maine, 96 U. S. 499; Sinking Fund Cases, 96 U. S. 700; Railroad Tax Cases, 13 Fed. Rep. 754, 755; Detroit v. Detroit etc. Plank Road Co., 43 Mich. 140-147.

But the act in question applies not only to the corporations existing under the laws of this state, but to all other corporations doing business in this state and in no wise indebted to the state for their charters. Surely, the legislature of this state could not alter, amend, or repeal the charter of a corporation existing under the laws of another state. Counsel for respondent states that similar statutes have been upheld in *Shaffer v. Union etc. Co.*, 55 Md. 74, *State v. Peel Splint Coal Co.*, 36 W. Va. 802, and *Hancock v. Yaden*, 121 Ind. 366, 16 Am. St. Rep. 396.

The statute upheld in *Shaffer v. Union etc. Co.*, 55 Md. 74, was one which provided that every corporation engaged in manufacturing or in operating a railroad in a certain county and employing ten hands or more should pay its employes the full amounts of their wages in legal tender money of the United States, and that every contract for the payment of such wages in any other manner be null and void. The ground upon which the act was upheld was that the legislature had the right to alter or amend the corporate charter. It is evident, in view of the authorities hereinbefore cited, that the ruling upon such ground was clearly incorrect. The decision cannot be regarded as of much value as a contribution to jurisprudence, and an examination of the authorities therein cited does not support it.

The case of *State v. Peel Splint Coal Co.*, 36 W. Va. 802, upheld the validity of two statutes of West Virginia, one prohibiting the payment of employes in paper redeemable otherwise than in lawful money, and the other prescribing a certain method for weighing coal at the mouth of a mine. The court consisted of four judges, and two of the four can affirm a judgment. The judgment was affirmed by two judges, and two dissented. The opinion of the two affirming the judgment, while lengthy, is not convincing.

¹⁹ The decision appears to have been based upon practically the same reasoning as the Maryland case, that, the corporation being a creature of the legislature and having a license under the state, the legislature could practically deprive it of any rights. In view of the fact that the opinion is in direct conflict with the two previous decisions of the same state, and is the opinion of two judges as against two others of the

same court, it cannot have weight here. It seems to us that anyone reading the able dissenting opinions of Judge English and Judge Brannon would be satisfied that the decision is wrong. Judge Brannon, in his dissenting opinion, says: "If, upon the suggestion of a supposed or real evil, always incident to the transaction of all business, the legislature can restrict lawful contracts, in private business, governments become not simply paternal but oppressive and tyrannical. The 'scrip act' would prevent the farmer, brickmaker, or coal operator from giving to his hands for wages an order to anyone for sugar, coffee, flour, or meat—a great reversal in the right of contracts as used time out of mind."

Hancock v. Yaden, 121 Ind. 366, 16 Am. St. Rep. 396, turned on the validity of a statute of Indiana which forbade the execution of contracts waiving the payment of wages in money. The court sustained the law, and the decision is the most direct authority in favor of plaintiff's contention of any he has cited. There is no authority cited in the opinion upon which it can legally stand. The court sustained the law upon the ground, "that it protected and maintained the medium of payment established by the sovereign power of the nation." Even if this be so, it is self-evident that the legislature, in passing the act, did not have in mind the protection of the coinage. The policy of the law in protecting the coin of the country would justify stringent laws against counterfeiting or debasing it, but certainly could not justify a law that precludes persons from agreeing to receive payment of their debts in anything but money. Since the submission of this case our attention has also been called by counsel for plaintiff to a decision of the circuit court of the United States for the ninth circuit of northern California in the case of *Skinner v. Garnett Gold Min. Co.*, 96 Fed. Rep. 735, in which this very statute was upheld. While we have the greatest respect for the able judge who wrote the opinion, yet it is not binding ²⁰ on us as a precedent, and the reasoning therein does not convince us of its correctness, nor in our opinion do the authorities therein cited support it. The learned judge refers to the case of *Louisville etc. R. R. Co. v. Tennessee R. R. Commission etc.*, 19 Fed. Rep. 679. In that case the circuit court of the United States held unconstitutional an act of the legislature of the state of Tennessee creating a railroad commission and making certain discrimination against railroads. In the opinion it is said: "Their general object [referring to the provisions of the

fourteenth amendment] is to secure to all citizens in like circumstances an equality of legal rights and to protect minorities and other interests not strong enough to protect themselves against the aggressions of the majority to restrain all injurious legislation discriminating against persons and property; . . . to compel an equal distribution of the burdens of government upon every citizen, natural or corporate, coming fairly within the purview of the law, and to give to everyone an equal right to invoke the remedies prescribed by law for the redress of wrongs done either to his person, reputation, or property." In the opinion of the learned judge it is further stated that the act of March 31, 1891 (Stats. 1891, p. 195), similar to the statute in question relating to the payment of wages of laborers by corporations, has been construed in *Keener v. Eagle Lake Land etc. Co.*, 110 Cal. 627, and *Ackley v. Black Hawk etc. Co.*, 112 Cal. 42; and that the act in question is directed to the same end as the statute of 1891. The act was under consideration but not passed upon as to its constitutionality in either case. In each case it was held that the laborers were entitled to an ordinary judgment such as is granted to other litigants, and in each of the cases the judgment of the lower court as to counsel fees and as to the judgment being declared a lien was reversed. In the case in 110 California it is said in conclusion of the opinion: "That portion of the judgment awarding counsel fees, and declaring that the plaintiff is entitled to a lien upon the property of the defendant, and directing a sale of such property, is reversed." And in the case in 112 California the same ruling was made and the same language used in reversing the portion of the judgment as to counsel fees and declaring the judgment a lien. The act of 1891 has, however, by this court in Bank, been²¹ held unconstitutional as special legislation in favor of a class and making an arbitrary classification: *Slocum v. Bear Valley Irr. Co.*, 122 Cal. 555, 68 Am. St. Rep. 68.

The court properly overruled the defendants' demurrer to the complaint. The allegation as to the assignment of the several causes of action prior to the time of the commencement of the action to plaintiff was sufficient when attacked by general demurrer. That portion of the judgment in favor of plaintiff and against the defendant corporation for five thousand and thirty-nine dollars and fifty-seven cents, with costs, should be affirmed. The portion awarding the plaintiff four hundred dollars attorneys' fees, and declaring that the plaintiff is entitled to a lien upon the property of defendant corporation and

to have a commissioner appointed to sell the property, should be reversed.

Haynes, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion that portion of the judgment in favor of plaintiff and against the defendant corporation for five thousand and thirty-nine dollars and fifty-seven cents, with costs, is affirmed. The portion awarding the plaintiff four hundred dollars attorneys' fees, and declaring that the plaintiff is entitled to a lien upon the property of defendant corporation and to have a commissioner appointed to sell the property, is reversed.

Harrison, J., Garoutte, J., Van Dyke, J.

Hearing in Bank denied.

IN THE CASE of State v. Wilson, 61 Kan. 32, an act to regulate the weighing of coal was construed. This statute provided that: "It shall be unlawful for any mine owner, lessee, or operator of coal mines in this state, employing miners at bushel or ton rates, or other quantity, to pass the output of coal mined by said miners over any screen or other device which shall take any part from the value thereof before the same shall have been weighed and duly credited to the employes and accounted for at the legal rate of weights as fixed by the laws of Kansas." The appellant Wilson was convicted of a violation of this statute, and on appeal sought to maintain that it was unconstitutional as affecting the right to contract, but the supreme court decided that such statute was a valid exercise of the police power of the state; that its effect was not to prevent the operators of coal mines and the miners employed by them from making such agreements as they chose concerning the amount of wages to be paid, nor did it in any way infringe upon the freedom of contract. In State v. Haun, 61 Kan. 146, the appellant was convicted in the court below of a violation of a statute providing that: "It shall be unlawful for any person, firm, company, corporation, or trust, or the agent or the business manager of any such person, firm, company, corporation, or trust, to sell, give, deliver, or in any way, directly or indirectly, to any person employed by him or it, in payment of wages due or to become due, any scrip, token, check, draft, order, credit on any book of account or other evidence of indebtedness, payable to bearer or his assignee, otherwise than at the date of issue, but such wages shall be paid only in lawful money of the United States, or by check or draft drawn upon some bank in which any person, firm, company, corporation, or trust, or the agent or the business manager of any such person, firm, company, corporation, or trust, has money upon deposit to cash the same.

"Sec. 2. All contracts to pay or accept wages in any other than lawful money, or by check or draft, as specified in section 1 of this act, and any private agreement or secret understanding that wages shall be, or may be, paid in other than lawful money, or by such check or draft, shall be void, and the procurement of such private agreement or secret understanding shall be unlawful and construed as coercion on the part of the employer.

"Sec. 3. If any person shall violate any of the provisions of either section 1 or 2 of this act, or shall compel, or in any manner attempt to compel, or coerce any employé of any corporation or trust to purchase goods or supplies from any particular person, firm, corporation, company, or trust, or at any particular store or place, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars, or be imprisoned in the county jail not less than thirty or more than ninety days, or by both such fine and imprisonment for each violation.

"Sec. 4. This act shall apply only to corporations or trusts, or their agents, lessees, or business managers, that employ ten or more persons."

The supreme court decided that such statute was unconstitutional and void, as an unjust discrimination, as being partial and unequal in its operation, and as in violation of the fourteenth amendment to the United States constitution, providing that no state shall deprive "any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." In support of its view the court cited *Shaver v. Pennsylvania Co.*, 71 Fed. Rep. 931; *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150; *State v. Goodwill*, 33 W. Va. 179, 25 Am. St. Rep. 863; *Fraser v. People*, 141 Ill. 171; *State v. Loomis*, 115 Mo. 307; *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315; *Godcharles v. Wigeman*, 113 Pa. St. 431; *Low v. Rees Printing Co.*, 41 Neb. 127, 43 Am. St. Rep. 670; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869; *Braceville Coal Co. v. People*, 147 Ill. 66, 37 Am. St. Rep. 206; *Pearson v. Portland*, 69 Me. 278, 31 Am. Rep. 276; *In re House Bill No. 203*, 21 Colo. 27; *In re Eight-hour Bill*, 21 Colo. 29; *Colon v. Lisk*, 153 N. Y. 188, 60 Am. St. Rep. 609; *State v. Julow*, 129 Mo. 163, 50 Am. St. Rep. 443; *People ex rel. Tyroler v. Warden of Prison*, 157 N. Y. 116, 68 Am. St. Rep. 763; *Matter of Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636. In the case of *In re Dalton*, 61 Kan. 257, it was determined that a statute providing that eight hours' work should constitute a day's labor for all laborers, workmen, mechanics, and other persons employed by or on behalf of the state, or by or on behalf of any county, city, township, or other municipality in the state, is merely a direction of the state to its agents, and is constitutional and valid.

CORPORATIONS ARE PERSONS within the meaning of constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws: See the monographic note to *St. Louis etc. Ry. Co. v. Paul*, 62 Am. St. Rep. 168; *Harbison v. Knoxville Iron Co.*, 103 Tenn. 421, 76 Am. St. Rep. 682.

SPECIAL STATUTES AFFECTING CORPORATIONS.—A statute providing that "every corporation doing business in this state shall pay the mechanics and laborers employed by it the wages earned by and due them, weekly or monthly, on such day in each week or month as shall be selected," is unconstitutional as special legislation attempting to provide for the creation of liens in favor of a special class of laborers, and a mere arbitrary classification not founded on natural differences, nor differences defined by the constitution: *Slocum v. Bear Valley Irr. Co.*, 122 Cal. 555, 68 Am. St. Rep. 68. See the extended note to *St. Louis etc. Ry. Co. v. Paul*, 62 Am. St. Rep. 165-182, on the protection of corporations from special and hostile legislation.

DENIGAN v. SAN FRANCISCO SAVINGS UNION.

[127 California, 142.]

HUSBAND AND WIFE—GIFT BY DEPOSIT IN BANK.—A deposit of money, the separate property of a wife, in a bank, and the taking of a pass-book showing an account in her name and that of her husband, "payable to the order of either of them," does not of itself show any gift to him, nor any joint interest in the deposit with right of survivorship; and the burden of proof is upon the husband's donee of such deposit to show that it did not continue to be the separate property of the wife.

HUSBAND AND WIFE—DEPOSIT IN BANK.—JOINT INTEREST in money, the separate property of the wife, with right of survivorship therein, cannot be established by showing a deposit of such money in bank, and the taking of a pass-book in the names of the husband and wife, "payable to either of them," without any express declaration between the parties that the money should be held by them in joint tenancy.

COTENANCY—JOINT OWNERSHIP.—A statutory provision that a right created in favor of several persons is presumed to be joint and not several, unless overcome by express words to the contrary, has reference only to the relation between the parties in whose favor the right is created, and the party against whom it exists, and does not determine the relation of joint interest and benefit of survivorship as between the owners of the right in their relations to one another.

ACTION — SURVIVORSHIP — TRUSTEESHIP.—A right of action on a promise for the payment of money to two joint promisees vests on the death of one in the survivor, but the right of the deceased promisee is not extinguished by his death, and the survivor holds the security and the proceeds as trustee to the extent of the interest of the deceased promisee in the fund, and if the survivor has no interest in the fund, he holds the whole thereof for the benefit of the estate of the deceased.

J. D. Sullivan and J. O'Gara, for the appellant.

G. D. Collins and J. Gartlan, for the respondents.

¹⁴⁵ **HARRISON, J.** The questions presented upon this appeal are similar to those involved in the case of *Denigan v. Hibernia Sav. etc. Soc.*, 127 Cal. 137. Ellen Denigan died July 3, 1896, and at the time of her death there was on deposit in the San Francisco Savings Union certain money standing upon the books of the bank in the names of herself and her husband, Frank Denigar, payable to the order of either of them. It was admitted at the trial that this account originated in a single deposit of three thousand dollars, made by her in this form February 27, 1888, and that at the time of the deposit it was her separate property. October 19, 1896, Frank Denigan

caused the sum of fourteen hundred dollars to be transferred upon the books of the bank from this account to a new account entitled "Frank Denigan or James Denigan," with directions to the bank from both Frank and James to pay to the individual order of either. Frank Denigan died in December, 1897, and after his death the plaintiff brought the present action to recover from the bank the amount of the deposit. Under an order of the court, the administrator of the estate of Frank Denigan was substituted as defendant in place of the bank, and the bank was permitted to pay into court the amount of the deposit, and was thereupon discharged from liability therefor. The administrator of the estate of Ellen Denigan filed a complaint in intervention claiming the deposit as a part of her estate. The cause was tried by the court, and findings made to the effect that the money was the separate property of Ellen, and that her husband never had any interest therein other ¹⁴⁶ than as agent to withdraw the same for her and for her benefit; that the withdrawal by him of the fourteen hundred dollars, and the opening of the new account with the bank therefor, was without right; that the plaintiff herein paid no consideration for said transfer and had no right to said money. Judgment was accordingly rendered in favor of the intervenor for the amount that had been paid into court. Subsequently the court set aside its decision and granted a new trial. From this order the intervenor has appealed. The record does not show upon what grounds a new trial was asked, or upon which the court set aside its decision, and no error of law is assigned in the bill of exceptions, but it is stated therein that the evidence is insufficient in certain particulars to justify the decision. The particular in which it is suggested upon the appeal that the decision is not sustained by the evidence is that in its decision the court found that at the death of Ellen, and for a long time prior thereto, the deposit stood on the books of the bank "payable to either Ellen Denigan or Frank Denigan," whereas it appears from the evidence that the deposit stood upon the books "in the names of Frank Denigan and Ellen Denigan, his wife, and payable to the order of either of them." Although the finding upon this point is not as extensive as the evidence, it cannot be said that so far as it is made it is not sustained by the evidence. It is, however, stated in the brief for the appellant that the decision was set aside by reason of the fact that the deposit made by Ellen in the names of herself and her husband, payable to either, indicated an intention to

give to him one-half of the deposit. The respondent, moreover, contends that by this form of the deposit a joint interest therein was created in favor of both, and that by virtue of the husband's survivorship he became vested with a right to the entire deposit.

What has been said in the opinion in *Denigan v. Hibernia Sav. etc. Soc.*, 127 Cal. 137, in reference to the proposition that by the deposit Ellen made a gift to her husband is applicable here. As therein shown, there is nothing, aside from the form in which the deposit account was opened, to show any intention on her part to part with her interest in the money, or to establish any of the elements of a completed gift. The only difference between the forms of the deposits in the two cases is ¹⁴⁷ that in the present case the account was opened in the name of "Francis and Ellen Denigan, payable to either," whereas in the other case the account and pass-book were entitled "Frank Denigan or Ellen Denigan in account with the Hibernia Savings and Loan Society." This difference in the form of the deposit or of the account does not, however, change the rule governing the rights of the parties to the money deposited. At the time of the deposit in each case the money was the separate property of Ellen, and, in the absence of any evidence tending to show a purpose or intention on her part to part with the title, it remained her separate property at the time of her death, notwithstanding its deposit in this form. The burden was upon the plaintiff to show that it had ceased to be her separate property, and, in the absence of any evidence tending thereto, his claim must be denied. In *Taylor v. Henry*, 48 Md. 550, 30 Am. Rep. 486, the deposit stood upon the books of the bank, "Joseph Henry, Margaret Taylor, and the survivor of them, subject to the order of either." The money was the property of Joseph Henry at the time it was deposited, and upon his death his sister Margaret claimed it by virtue of this form of the account. The court held that she was not entitled to it, saying: "The whole question depends upon the meaning and intention of the deceased in making the deposit in the form adopted, as gathered from the entry in the bank-book and all the circumstances surrounding the deceased at the time"; and after holding that the words "and the survivor of them" did not import a gift, said: "Here the deposit was in the joint names of the deceased and his sister, and the survivor of them, but subject to the order of either. Having thus retained the power to draw out the money, the deceased did not divest himself of

dominion and control over the fund. He could have drawn out every dollar after the deposit, or at any time up to the moment of his death, and applied it in any manner he might have thought proper. It is not contended that the sister had the least right or interest in the money before the deposit; nor is it contended that she acquired any interest therein otherwise than by the supposed gift of the brother; and the only evidence relied on to support the factum of the supposed gift is the form of the entry in the bank-book. But, as will be observed, ¹⁴⁸ there are no terms in the entry that import of themselves an actual present donation by the brother to the sister, and the dominion retained by the brother over the fund enabled him to displace and utterly destroy all power conferred upon the sister in respect to the fund." The same principle was afterward maintained in *Gorman v. Gorman*, 87 Md. 338. In *Schick v. Grote*, 42 N. J. Eq. 352, a deposit had been made in the following form: "Bank for Savings in account with August Grote and wife, Edvina, or either." The money was the property of Mr. Grote, and after his death it was claimed in a suit for the same by his wife that by depositing it in this form he had made her a gift of it. The court held otherwise, saying: "The form of the account in which the deposit was made is not evidence of gift to the wife." In *Noyes v. Newburyport Sav. Inst.*, 164 Mass. 583, 49 Am. St. Rep. 484, it was held that a deposit by Annie M. Pike, under an account headed "Annie M. Pike and Mary L. Hewett, payable to either or the survivor," remained the property of the original depositor, and that after her death her executors were entitled to the same. The cases cited by the respondent do not contravene the rule held in the above cases. In *Mack v. Mechanics' etc. Bank*, 50 Hun, 477, cited by him, there was testimony before the court tending to show that after the deposit had been made the depositor came to the bank with his mother, and had the account changed to their joint names, and afterward made a gift of the deposit to her. In *Metropolitan Sav. Bank v. Murphy*, 82 Md. 315, 51 Am. St. Rep. 473, the only question presented for determination was the liability of the bank upon its contract. At the time the deposit was made there was written at the head of the account in the bank-book, at the request of the depositor, an agreement that at the death of either the balance should belong to the survivor. After his death the bank paid the balance to the other. In an action by his executors against the bank to recover the deposit, judgment was given in favor of the bank upon the ground that

in making the payment to the survivor the bank had merely carried out its contract, and could not be required to pay the same again.

The respondent's claim that Francis became vested with Ellen's title to the deposit by virtue of his survivorship is equally ¹⁴⁹ untenable. Title by survivorship exists only when the estate is held in joint ownership, and, unless the deposit was owned by Francis in the lifetime of Ellen jointly with her, there was no joint interest therein to which the incident of survivorship could attach. We have seen that she did not part with her title to the deposit by reason of the form in which it was made, and, as the title of Francis depends entirely thereon, it is evident that he had no joint interest with her in the moneys so deposited. Joint interests or estates are such as are acquired at the same time and by the same title. Section 683 of the Civil Code declares: "A joint interest is one owned by several persons in equal shares by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants." The proposition of the respondent that this section applies only to real estate is without support. There is no limitation of this character in the section, and, as it is found in the title headed "Ownership" and the chapter thereof which treats of "Interests in Property," irrespective of its character, it must be held applicable to all kinds of property. The money deposited by Ellen was up to that time her separate property, and it cannot be said that she then acquired any interest therein; and, if it could be assumed that by reason of the form in which the deposit was made Francis acquired any interest therein, it was acquired at a different time and by a different title from that of Ellen. There was no declaration that the money should be held in joint tenancy, and the words "payable to either" placed in the account take away the claim of a joint interest. In *Gorman v. Gorman*, 87 Md. 338, the entry of the deposit made in the book was "Theresa McConnell and her niece, Maggie S. Gorman, joint owners; payable to the order of either or the survivor." The money was the individual property of Theresa, and the account was changed upon the books of the bank into this form at her request, and the entry was signed by her and Miss Gorman. The court held that, although the words "joint owners" were employed, the deposit did not become the joint property of both. In *Taylor v. Henry*, 48 Md. 550, 30 Am. Rep. 486, the court refused to

sustain the claim of the sister by virtue of her survivorship upon the ground that the ¹⁵⁰ gift was not perfect and irrevocable during the life of the donor. The same rule was observed in *Whalen v. Milholland*, 89 Md. 199.

The respondent further urges that upon the deposit in the bank the money became the property of the bank, and that by virtue of the transaction then effected a chose in action resulted wherein a joint liability was created on the part of the bank in favor of Ellen and her husband, which, upon the death of Ellen, survived to the husband, and in support of this proposition cites section 1431 of the Civil Code, which provides that a right created in favor of several persons is presumed to be joint and not several, and that this presumption can be overcome only by express words to the contrary. This provision has reference, however, merely to the relation between the parties in whose favor the right is created, and the party against whom it is created. It is correlative to the obligation incurred by the party against whom the right exists, but does not purport to determine the interest of the parties in whose favor the right exists as between themselves. As Ellen did not divest herself of her property in the money by the form in which she made the deposit, she retained the same interest in this property represented by the chose in action or right resulting from the obligation thereby assumed by the bank. Her husband acquired no right to the money which he might obtain upon this chose in action as against her. While the bank would have been authorized to pay all or any portion of it to him in her lifetime, he could have been compelled to account to her for what he might thus receive; and in an action against the bank wherein the claim of each is presented for adjudication the court is authorized to render a judgment according to their respective rights. The right of action on a bond held by two joint obligees, or on a promise for the payment of money to two joint promisees, vests on the death of one in the survivor: 1 *Parsons on Contracts*, 31; but the right of the deceased obligee or promisee is not extinguished by his death. The survivor will hold the security and the proceeds as trustee to the extent of the interest of the deceased joint obligee or promisee in the debt or fund, and, if the survivor had no interest in the fund, he will hold the whole thereof for the benefit of the ¹⁵¹ estate of the deceased: *Mulcahey v. Emigrant etc. Sav. Bank*, 89 N. Y. 435. Mr. Freeman, in his treatise on *Cotenancy and Partition*, says in section 16: "The loan of money, for which a

mortgage is given, is not regarded as a transaction which would ordinarily raise the presumption that the parties thereby intended to create a joint ownership in the thing lent with the benefit of survivorship." In *Blake v. Sanborn*, 8 Gray, 154, an action to foreclose a mortgage given to four persons to secure a note payable to them was held to be properly maintained by the survivors, but the court said: "If the conditional judgment is discharged by payment, they will, of course, be answerable over to the administrator of the deceased mortgagee for one-fourth of the note; if the mortgage is foreclosed, they will hold the land in trust for all concerned in the mortgage": See, also, *Burnett v. Pratt*, 22 Pick. 556; *Story's Equity Jurisprudence*, sec. 1206; *Bliss on Code Pleading*, 3d ed., sec. 62. Counsel for respondent cites in support of his claim *Sanford v. Sanford*, 45 N. Y. 723, where the husband loaned certain money and received therefor a promissory note payable to himself and his wife, and in which it is said in the opinion: "Taking this note in the name of himself and wife shows that the husband intended thereby to give it to her in case she survived him, and a delivery to her was unnecessary to perfect the gift." But we are compelled to coincide with Judge Redfield, who, in commenting upon this in *Matter of Ward*, 2 Redf. 251, said that this language "seems to run directly counter to all settled notions of the law in respect to such gifts, and seems not to have been fortified by the learned judge who delivered that opinion by any authority." The language above quoted is to be regarded rather as dictum than as authority, since, after stating that the note belonged to the wife as the survivor, it held for other reasons that the maker owed it to the estate of the husband, and not to the wife, and reversed a judgment in her favor, upon the ground that she was not the real party in interest.

We hold, therefore, that Francis Denigan had no interest in the deposit during the lifetime of his wife and did not upon her death become vested with any interest therein as against the claim of her administrator, and that, as the evidence incorporated in the bill of exceptions would not have authorized a judgment in favor of the plaintiff, the court erred in setting aside its decision.

The order granting a new trial is reversed.

Garoutte, J., and Van Dyke, J., concurred.

IN THE CASE of Denigan v. Hibernia Sav. etc. Soc., 127 Cal. 137, the facts involved in a deposit of money by a wife in a savings bank were in all respects similar to those in the principal case, and in the former case the court said, in deciding the ownership of the fund after the death of the wife, that: "The form in which the deposit was made is entirely consistent with a desire on the part of the wife to give to her husband authority to withdraw money from the bank from time to time as she might need it, and it should not be held that she intended to part with her title thereto by reason of an ambiguous phrase, which is quite consistent with a contrary purpose: Matter of Ward, 2 Redf. 251; Orr v. McGregor, 43 Hun, 528; Shuttleworth v. Winter, 55 N. Y. 624; Marshal v. Crutwell, L. R. 20 Eq. 328; Beaver v. Beaver, 117 N. Y. 421, 15 Am. St. Rep. 531; Matter of Bolin, 136 N. Y. 177; Flanagan v. Nash, 185 Pa. St. 41. When the claim of a gift is not asserted until after the death of the alleged donor, it should be sustained by clear and satisfactory evidence of every element which is requisite to constitute a gift: De Puy v. Stevens, 37 N. Y. App. Div. 203; Whalen v. Milholland, 89 Md. 199."

A BANK ACCOUNT PAYABLE TO THE ORDER OF A HUSBAND OR WIFE, the balance at the death of either to belong to the survivor, constitutes an agreement between the bank and the husband which remains in force after his death, and justifies payment to her, as survivor, of the moneys remaining on deposit at his death: Metropolitan Sav. Bank v. Murphy, 82 Md. 314, 51 Am. St. Rep. 473.

BANK OF ORLAND v. DODSON.

[127 California, 208.]

JURISDICTION—SERVICE OF SUMMONS—JUDGMENT. The fact of service of summons, rather than proof of its service, gives the court jurisdiction of the person of the defendant, and, if he is in fact served with summons, a return showing upon its face that it was made by one having authority, even though not in fact so made, confers upon the court jurisdiction to hear and determine the case, and, until set aside by some valid proceeding, a judgment by default based thereon is valid.

JURISDICTION—WAIVER OF RIGHT TO ASSAIL.—If defendant is in fact served with summons, and does not appear nor in any way call in question the regularity of the service, takes no steps to have the judgment set aside, and permits his property to be sold without objection, pursuant to the judgment entered in the action, and pays a deficiency judgment, he cannot, after the time for appeal has expired, attack such judgment by questioning the regularity of the service of the summons.

JURISDICTION—LOSS OF.—After a court has entered its judgment upon a service of summons, appearing from the record to have been regular, it has no jurisdiction to again try the case until that judgment is set aside; and after the time for an appeal therefrom has elapsed and the judgment has been satisfied, its judgment at the second trial of the case under an alias summons is void.

C. L. Donohoe and S. Millington, for the appellants.

B. F. Geis, for the respondent.

200 CHIPMAN, C. Foreclosure. Plaintiff remarks in its brief: "The case is indeed a peculiar one, and none just like it is found in the books." The statement is probably correct. The undisputed facts are that plaintiff brought the action in due time to foreclose a mortgage given by defendants. Summons duly issued April 17, 1896, and was served and returned on April 18, 1896, the return being signed "H. C. Stanton, Sheriff, by C. H. Merrill, Deputy Sheriff." An indorsement made **210** thereon by the clerk shows the service to have been regularly made upon the defendants, and that, the time for answer having expired, their default was duly entered. On May 13, 1896, the court entered its decree containing the usual recitals and showing, among other facts, that summons was served upon defendants, and that "the time to appear and demur or answer the complaint having expired, and no appearance having been made by either of the said defendants, . . . the default of said defendants . . . was duly given and made and regularly entered." The decree then recites that the cause came on to be heard, and evidence, both oral and documentary, was introduced, from which it appeared that all the allegations of the complaint are true, etc. Wherefore the court found the amount due on the promissory note mentioned in the complaint, to wit, two thousand seven hundred and forty-three dollars and fifty-five cents, and decreed the same to be a lien upon the described premises; ordered the sale thereof and appointed a commissioner to conduct the sale, and also made the usual directions as to a deficiency judgment. The commissioner was duly appointed; he qualified, and on June 10, 1896, he made the sale in due form and upon due notice, and made return thereof, from which it appears that plaintiff became the purchaser for the sum of two thousand seven hundred dollars, and received a certificate of sale. In his return the commissioner shows that he deducted certain expenses from said amount, leaving two thousand six hundred and eighty dollars, and paid the same to plaintiff and took its receipt therefor, which was credited upon the judgment, leaving a deficiency of sixty-three dollars and fifty-five cents, for which judgment was entered July 9, 1896, and was by defendants fully paid August 10, 1896. The period for redemption having expired, the commissioner, on January 14, 1897, made and delivered his deed of the prem-

ises in due form to plaintiff, which was duly acknowledged and recorded January 15, 1897. Apparently, plaintiff became distrustful of the validity of its judgment, because, as it turned out, Merrill was not, at the time he served the summons, in fact a deputy sheriff; and, acting on this assumption, plaintiff caused the sheriff to make an affidavit to the effect that Merrill was not a duly and regularly appointed deputy sheriff when ~~211~~ he served the summons. Whereupon plaintiff, on April 12, 1897, filed this affidavit with the clerk, obtained an alias summons and caused it to be served upon defendants. Defendants appeared by demurrer, which was overruled, and they thereupon answered, and, among other things averred the facts as to the former trial of the cause, the judgment therein, and that it has not been set aside or modified; set forth the sale pursuant to the decree and the purchase by plaintiff, the entry of the deficiency judgment and its payment in full satisfaction of all claims against defendants, and prayed for a dismissal of the action.

In this state of the matter and against defendants' objections the court proceeded to hear and determine the case upon the original complaint as it was amended at the first trial, and to try the cause precisely as though it had not been already once tried. The court and counsel for plaintiff acted upon the theory that all the previous proceedings were void and could be treated as though they had no existence whatever.

We think plaintiff entirely misconceived the powers of the court in the premises. It is conceded, and the fact was, that defendants were served with summons. The court had jurisdiction by virtue of this service, for the record shows on its face that the service was made by one having authority, and the court, therefore, could hear and determine the cause; until set aside by some proceeding known to the law its judgment was valid, and it follows that the sale in pursuance thereof was valid: *Herman v. Santee*, 103 Cal. 519, 42 Am. St. Rep. 145; *Freeman on Judgments*, sec. 126. It is the fact of service, rather than the proof of service, that gives jurisdiction: *In re Newman*, 75 Cal. 220, 7 Am. St. Rep. 146.

Defendants, as we have seen, were in fact served with summons; they did not appear nor in any way call in question the regularity of the service; they took no steps to have the judgment set aside, but permitted their property to be sold, without objection, pursuant to the judgment entered in the action, and

they paid the deficiency judgment; they did not appeal from the judgment, and the time for appeal had expired when the alias summons was issued. Under the circumstances disclosed the defendants could not attack the judgment, and, so far as ²¹² we know, never threatened to do so, nor did they in any way attempt to prevent the plaintiff from enjoying its fruits. The plaintiff had all the relief under that judgment to which it was entitled under any judgment. The court had no authority to enter upon a second trial of the cause, and its proceedings therein were, therefore, unavailing for any purpose and wholly unauthorized. After the court had entered its judgment it had no jurisdiction to again try the case until that judgment was set aside; and when the alias summons was issued the action was no longer pending, for judgment had been entered, the time for appeal had elapsed, and the judgment had been satisfied. The court was without jurisdiction and its judgment at the second trial was void: Freeman on Judgments, sec. 127.

It is advised that the judgment and order be reversed and the proceeding dismissed.

Cooper, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are reversed and the proceeding dismissed.

Garoutte J., Van Dyke, J., Harrison, J.

JURISDICTION.—THE FACT OF SERVICE, not the proof of service, gives a court jurisdiction: Cunningham v. Spokane etc. Co., 20 Wash. 450, 72 Am. St. Rep. 113; Herman v. Santee, 103 Cal. 519, 42 Am. St. Rep. 145.

ON THE VACATION OF JUDGMENTS for defective service of process, see the monographic note to Furman v. Furman, 60 Am. St. Rep. 645, 646.

CHILSTROM v. EPPINGER.

[127 California, 326.]

JUDGMENT—ASSIGNMENT.—Without an assignment of the undertaking on appeal the assignee of a judgment cannot maintain an action against the sureties on the appeal bond, no matter whether the assignment was made pending the appeal or after the judgment had become a finality.

JUDGMENTS — ASSIGNMENT. — THE CONTRACT OF SURETIES upon an appeal bond is entirely distinct from, and independent of, the judgment, and not a necessary incident to it, and the rights under it do not pass by assignment of the judgment.

G. and A. Webster and L. Lamy, for the appellants.

S. M. Swinnerton, for the respondent.

³²⁶ HENSHAW, J. The action is by the assignee of the judgment to recover on the undertakings given on appeal and given to stay proceedings. A judgment was rendered in the justice's ³²⁷ court in favor of Morgenson, plaintiff, against Grabow, defendant. An appeal was taken, and the undertakings here sued upon were given to support it. Before determination of the appeal Morgenson assigned his judgment to P. O. Chilstrom, plaintiff in this action. He made no assignment of his rights upon the undertakings. After the assignment of the judgment the appeal was dismissed, and Chilstrom instituted this action, in which he recovered judgment, from which defendants appeal.

In *Moses v. Thorne*, 6 Cal. 87, it was held that, in the absence of an assignment of the undertaking, the assignee of the judgment could not maintain an action against the sureties upon the appeal bond, the reasoning being that the contract of the sureties was entirely distinct from and independent of the judgment, was not a necessary incident to it, and the rights under it did not pass by assignment of the judgment: See, also, *Dray v. Mayer*, 5 Or. 185. The point is determinative of this appeal, for we can perceive no distinction between a case where the judgment has been assigned after it has become a finality, and the case at bar, where the judgment was assigned pending the determination of the appeal.

The judgment is therefore reversed and the cause remanded.

McFarland, J., and Temple, J., concurred.

Judgment—Effect of Assignments of.

Assignability at Common Law and Under Statutes.—Under the rules of the common law, judgments and decrees are not assignable so as to vest the legal title in the assignee, but the latter takes only an equitable interest, subject to every equity and charge attaching to them in the hands of the assignor: *United States v. Samperyac*, Hemp. 118; *Wright v. Levy*, 12 Cal. 257; *Fore v. Manlove*, 18 Cal. 436; *McJilton v. Love*, 13 Ill. 486, 54 Am. Dec. 449; *Hossack v. Underwood*, 55 Ill. 123; *Hughes v. Trahern*, 64 Ill. 48; *Yarnell v. Brown*, 170 Ill. 362, 62 Am. St. Rep. 380; *Millar v. Field*, 3 A. K. Marsh. 104; *Vanhouten v. Reilly*, 6 Smedes & M. 440; *Chemical Bank v. Bulkley*, 68 Mo. App. 327. Hence, where such rule prevails, the assignee of a judgment cannot proceed for its collection, nor maintain an action thereon in his own name: *Moore v. Ireland*, 1 Ind. 581; *Garvin v. Hall*, 83 Tex. 295; *Chemical Bank v. Bulkley*, 68 Mo. App. 327; *Bunnell v. Magee*, 9 Ala. 433; *Masterson v. Gibson*, 56 Ala. 56; *Lovius v. Humphries*, 67 Ala. 437; *Wolffe v. Eberlein*, 74 Ala. 99, 49 Am. Rep. 809; *Weir v. Pennington*, 11 Ark. 745; *Reid v. Ross*, 15 Ind. 265. It has been held that such assignee cannot, in his own name, maintain a summary proceeding against the sheriff for failure to pay over money collected on an execution issued on the judgment: *Lovius v. Humphries*, 67 Ala. 437. The assignment of the judgment, however, vests the exclusive right in the assignee to control such judgment, and to use the name of the assignor, with or without the latter's consent, either in the issuance of process to collect it, or to prosecute a *scire facias* to revive it, or in an original suit thereon: *Haden v. Waiker*, 5 Ala. 86; *Steele v. Thompson*, 62 Ala. 323; *Weir v. Pennington*, 11 Ark. 745; *Wright v. Levy*, 12 Cal. 257; *Chemical Bank v. Bulkley*, 68 Mo. App. 327; *Hudson v. Morriss*, 55 Tex. 595; *Elliott v. Waring*, 5 T. B. Mon. 338, 17 Am. Dec. 69; *Vanhouten v. Reilly*, 6 Smedes & M. 440; *Garvin v. Hall*, 83 Tex. 295; *Macin v. Bibb Co. Academy*, 7 Ga. 204; *Forbes v. Tiffany*, 4 Ind. 204; *Johnson v. Martin*, 54 Ala. 271. While an action at law cannot be prosecuted by the assignee in his own name, in equity he is considered the real party in interest, and he may in his own name sue therein on the assigned judgment: *Pittsburg etc. Ry. Co. v. Volkert*, 58 Ohio St. 362; *Moover v. Moover*, 87 Ala. 545; but even then he should make the assignor a party to the bill: *Elliott v. Waring*, 5 T. B. Mon. 338, 17 Am. Dec. 69.

The common-law inhibition preventing the direct assignment and transfer of the legal as well as the equitable title to judgments is no doubt abolished in a great majority of the states of the American Union, and under the various statutes it is now not merely the privilege, but also the duty, of the assignee of a judgment to control and enforce it in his own name, or to revive it by *scire facias*: *Reid v. Ross*, 15 Ind. 265; *Chicago etc. Ry. Co. v. Higgins*, 150 Ind. 329; *Edmonds v. Montgomery*, 1 Iowa, 143; *Charles v. Has-*

kins, 11 Iowa, 329, 77 Am. Dec. 148; Moore v. Nowell, 94 N. C. 265; Timberlake v. Powell, 99 N. C. 233; Benne v. Schnecko, 100 Mo. 257; Chemical Bank v. Bulkley, 68 Mo. App. 327; Murphy v. Cochran, 1 Hill, 339; Mandlebaum v. Gregovich, 24 Nev. 154; Jones v. Jones, 87 Me. 117; Moore v. Smith, 103 Mich. 387; Walburn v. Chenault, 43 Kan. 352. A bona fide assignment of a judgment, valid in the state where it is recovered, is valid everywhere: Noble v. Thompson Oil Co., 79 Pa. St. 354, 21 Am. Rep. 66; and the assignee may sue thereon in his own name: Baker v. Stonebraker, 34 Mo. 172.

Warranty.—The assignor of a judgment impliedly warrants that it is a valid subsisting obligation against the debtor for the amount specified therein, and that it has not been paid either in whole or in part. Hence the assignment of a judgment implies a warranty of the existence of the debt evidenced by the judgment, at the time of the transfer, and if the judgment is not then in existence as a claim, the assignor is bound to restore the price paid therefor to the purchaser: Johnson v. Boice, 40 La. Ann. 273, 8 Am. St. Rep. 528. If the judgment does not belong to the assignor, or is invalid, or has been wholly or partially paid, he is answerable to his assignee on the implied warranty for the damages resulting from such payment, invalidity, or failure of title: Emerson v. Knapp, 75 Mo. App. 92; Lile v. Hopkins, 12 Smedes & M. 299, 51 Am. Dec. 115; Hauks v. Harris, 29 Ark. 323; Hurd v. Slaten, 43 Ill. 348. On the assignment of a judgment, the law implies a warranty that the whole amount remains due and unpaid, and a stipulation that the assignor warrants his title and power to assign only to the extent of the consideration paid is a limitation, not upon the extent of the title warranted, but upon the liability of the assignor, in case of failure: Furniss v. Ferguson, 15 N. Y. 437; 34 N. Y. 485. The assignee of part of a judgment is entitled to recover the amount due to him from the assignor who has received a conveyance of property in satisfaction of the judgment debt: Barnum v. Green, 13 Colo. App. 254. The assignor of a judgment, even without recourse, warrants that it is what it purports to be, that it is unpaid, and constitutes a legal obligation against the defendant therein: Emerson v. Knapp, 75 Mo. App. 92; Findley v. Smith, 42 W. Va. 299. An assignor of a judgment without recourse is not discharged, unless otherwise agreed, from liability upon the implied warranty that it is a valid subsisting obligation for the amount it purports to be, and that no part of it has been paid, but a transfer by the assignee of the judgment, ignorant of any defect therein or defense thereto, of simply his right, title, and interest, without recourse, does not render him liable upon such implied warranty: Miller v. Dugan, 36 Iowa, 433. The words "without recourse," used in the assignment of a judgment, can only have effect to negative the liability of the assignor to the assignee for damages resulting

from the breach of the warranties implied in the assignment, namely, that the judgment is unsatisfied, that the assignor has a legal title, and that the judgment is a valid and subsisting obligation for the sum for which it purports to be entered. Notwithstanding the words "without recourse," the assignment passes title to the judgment with all incidents and advantages arising therefrom: *Thompson v. First Nat. Bank*, 102 Ga. 696. The assignor of a judgment without recourse is not answerable for the insolvency of the judgment debtor: *Findley v. Smith*, 42 W. Va. 299; *Thompson v. First Nat. Bank*, 102 Ga. 696.

An assignment of a judgment imports a warranty of title, but is not a guaranty of collection or of a lien as primary, but only of a debt, unimpaired by secret defenses, payment, or other matter rendering it invalid: *Fassitt v. Middleton*, 47 Pa. St. 214, 86 Am. Dec. 535; *Mohler's Appeal*, 5 Pa. St. 418, 47 Am. Dec. 413; *Jackson v. Crawford*, 12 Serg. & R. 165; 14 Serg. & R. 290; *Robinson v. White*, 4 Litt. 237.

Rights Passing by Assignment.—An assignment of a judgment passes all of the assignor's assignable rights therein, and entitles the assignee to use every remedy, lien, or security available to the assignor as a means of enforcing the judgment, unless expressly excepted or reserved in the transfer: *Thompson v. First Nat. Bank*, 102 Ga. 696; *Applegate v. Mason*, 13 Ind. 75; *Bolen v. Crosby*, 49 N. Y. 183; *Schleman v. Bowlín*, 36 Minn. 198; *Brooks v. Sanders*, 110 Ill. 453; *Burgess v. Cave*, 52 Mo. 43; *Wilson v. Wilson*, 3 Del. Ch. 183. However, the rights which pass to the assignee along with the judgment are such only as are vested in the assignor by virtue of that particular judgment, and rights which the assignor has no power to assign do not pass. In other words, the assignee of a judgment acquires no greater rights as against the judgment debtor than his assignor had: *Fred Miller Brewing Co. v. Hansen*, 104 Iowa, 307; *Boggs v. Douglass*, 105 Iowa, 344; *Timberlake v. Powell*, 99 N. C. 233; *Whittemore v. Judd Linseed etc. Co.*, 124 N. Y. 565, 21 Am. St. Rep. 708; *Borst v. Baldwin*, 30 Barb. 180. Among the rights and remedies which pass by the assignment of a judgment may be mentioned the debt on which such judgment is founded, so long as the latter remains unreversed: *Brown v. Scott*, 25 Cal. 189; *Bolen v. Crosby*, 49 N. Y. 183. The assignment of a judgment recovered by the indorsee upon a note for the purchase money on land carries with it the vendor's lien: *Griffin v. Camack*, 36 Ala. 695, 76 Am. Dec. 344; *Ritter v. Cost*, 99 Ind. 80. The assignee has, as part of his contract, a right to all the remedies appropriate to the collection of the judgment, including the election to enforce it against any real estate of the defendant, who cannot, after the assignment, abridge such right by selling part of his land, or by any special arrangement with the purchaser for the payment of the judgment out of the land sold, without the assignee's permission: *Wilson v. Wilson*, 3 Del. Ch. 183. Rights

against a sheriff for negligence in the care of the property pass to the assignee of a judgment: *Citizens' Nat. Bank v. Loomis*, 100 Iowa, 266, 62 Am. St. Rep. 571; and such assignee takes the assignor's right to enforce the judgment by supplemental proceedings: *Burns v. Bangert*, 16 Mo. App. 22.

In *Ullmann v. Kline*, 87 Ill. 268, it was held, contrary to the rule laid down in the principal case, that the assignment of a judgment after an appeal to the supreme court, in equity, carries with it the security afforded by the appeal bond, in case of affirmance. The bond is but an incident of the debt, and passes with it; and to the same effect is *Burt v. Lustig*, 60 N. Y. Sup. Ct. 181; affirmed, 137 N. Y. 538. The assignment of a judgment against a defendant in replevin operates as an assignment of a bond given by him to obtain a return of the property: *Schlieman v. Bowlin*, 36 Minn. 198. In Michigan an assignment of a judgment in attachment does not carry with it the legal title to the attachment bond: *Forrest v. O'Donnell*, 42 Mich. 556. And a right of action against a clerk or his bondsmen for failure to index a judgment properly does not pass to the assignee: *Redmond v. Staton*, 116 N. C. 140. An assignment of a judgment necessarily carries with it the cause of action on which it is based, together with all the beneficial interests of the assignor in the judgment and all of its incidents: *Citizens' Nat. Bank v. Loomis*, 100 Iowa, 266, 62 Am. St. Rep. 571.

An assignor of a judgment or of the claim on which it is founded, and upon which judgment is recovered, has, after the assignment, no control over it, nor of an execution issued thereon, taken out by the assignee: *Clarke v. Hogeman*, 13 W. Va. 718. If, after the assignment, the debtor pays the assignee, the assignor cannot, on account of any equities between him and the assignee, compel the debtor to pay the amount to himself: *Hewett v. Outland*, 2 Ired. Eq. 438. The assignment conveys away the assignor's interest in the further enforcement of the judgment, but not his interest in money previously collected on it: *Robinson v. Towns*, 30 Ga. 818. An assignment revokes the assignor's attorney's authority to further control the judgment or to receive the money on the execution: *Trumbull v. Nicholson*, 27 Ill. 149; but such attorney's lien for his compensation is good as against the assignee of the judgment, though the latter had no notice of such lien: *Bent v. Lipscomb*, 45 W. Va. 183, 72 Am. St. Rep. 815. After assignment the assignor has no attachable interest in the judgment: *Ives v. Addison*, 39 Kan. 172; *Noble v. Thompson Oil Co.*, 79 Pa. St. 354, 21 Am. Rep. 66. A subsequent attaching creditor of the assignor is bound by the assignment to the same extent as such assignor: *First Nat. Bank v. Ladd*, 126 Pa. St. 188. The rule is the same even where the attachment is instituted before the assignment is formally completed: *Knapp v. Standley*, 45 Mo. App. 265; *Clodfelter v. Cox*, 1 Sneed, 330, 60 Am. Dec. 157. The assignment of a judgment is valid and effective to vest the title to it in the assignee, so as to

defeat a subsequent garnishment of the judgment debtor by a creditor of the assignor having no notice of the assignment before service of the garnishment: *Schoolfield v. Hirsh*, 71 Miss. 55, 42 Am. St. Rep. 450. If an execution is levied on the judgment debtor's land by the assignee of the judgment, a subsequent levy on the land by a creditor of the assignor cannot prevail against the rights of such assignee, nor render void a deed to the land subsequently made by him to the assignor: *Cushman v. Carpenter*, 8 Cush. 388.

An assignor of a judgment cannot pass any title to it by a subsequent assignment to a third person, and the fact that the last assignee has no notice of the prior assignment does not help his title, as he can have no better equity than the first assignee who is prior in point of time: *Clarke v. Hogeman*, 13 W. Va. 718; *Stanford v. Connery*, 84 Ga. 731.

The rule of caveat emptor applies to the assignment and purchase of a judgment in the same manner as it does to the purchase of any other personal property. If the assignor has no title to the judgment, the assignee takes none, whether he has notice of such fact or not, as he can stand in no better position than the assignor: *Mitchell v. Hockett*, 25 Cal. 538, 85 Am. Dec. 151; *Brice v. Taylor*, 51 Ark. 75; *Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459; *Rea v. Forrest*, 88 Ill. 275; *Rider v. Kelso*, 53 Iowa, 367; *Shields v. Moore*, 84 Ind. 440; *Cox v. Palmer*, 60 Miss. 793; *Sutton v. Sutton*, 26 S. C. 33. The assignee of a judgment stands in no better position than the original plaintiff, and the judgment may be vacated in the assignee's hands for the same reasons that would justify such vacation in the hands of the assignor: *Weber v. Tschetter*, 1 S. Dak. 205. One who takes an assignment of a judgment after it has been in fact satisfied, but before satisfaction is entered on the record, takes subject to the lien of encumbrances intervening between the judgment and the assignment: *Traphagen v. Lyons*, 38 N. J. Eq. 613; *Jones v. Schmidt*, 55 N. J. L. 504. A surety who pays a judgment against himself and his cosureties cannot, by taking an assignment of such judgment, enforce the full amount thereof against his cosureties: *McGinnis v. Loring*, 126 Mo. 404. An assignment of a judgment to one primarily bound to pay it, and who does pay it, cannot have the effect of keeping it alive for his benefit: *Montgomery v. Vickery*, 110 Ind. 211. The assignee of a judgment founded on contract cannot maintain any suit thereon in a federal court, unless his assignor could have maintained such suit: *Walker v. Powers*, 104 U. S. 245. The assignee of a satisfied judgment, fraudulently revived, takes it at his peril: *Troup v. Wood*, 4 Johns. Ch. 228.

Good Faith.—An assignment of a judgment not in good faith does not convey title to the assignee: *Empire Land etc. Co. v. Engley*, 18 Colo. 388; *Frybarger v. Andre*, 106 Ind. 337; but to impeach the good faith and validity of the assignment, the judgment debtor

must show not only that there was fraud between the contracting parties, but also that he was injured thereby: *Long v. Klein*, 35 La. Ann. 384. An innocent assignee of a judgment, without notice, actual or constructive, of an injunction not yet served, restraining the assignment of such judgment, is a good faith purchaser, and the assignment is valid: *Robertson v. Segler*, 24 S. C. 387. The fact that the assignee has purchased the judgment for less than its face value does not establish that he is not a purchaser in good faith. He has a right to purchase as cheaply as he can, and stands entitled to all of the rights of his assignor: *Hannon v. Hope*, 87 N. Y. 10. But it has also been held that if the judgment creditor agrees to compromise his judgment, and then assigns it to one who makes the payment of such compromise, the assignee cannot claim a greater amount than he has paid from the judgment debtor: *Sutton v. Sutton*, 26 S. C. 33. And if a defendant procures a third party to buy a judgment rendered against him, such third person can recover of him only the amount paid for the judgment, although he takes an assignment thereof to himself: *Campion v. Friedberg*, 55 Ill. App. 450.

In determining whether the judgment plaintiff and real owner of an assigned judgment is estopped to assert his ownership as against a second assignee, on the ground that such second assignee occupies the position of a purchaser for value in good faith without notice and in reliance upon the apparent ownership, the amount of the consideration paid by him is an important fact. If such amount is greatly disproportionate to the true value of the judgment, that fact may authorize the inference that the claim to have paid value is false, and it is further important as bearing on the questions of notice and good faith. In such case the interest of the second assignee of the judgment, if recognized at all, should be limited to the amount he actually paid, and the measure of the estoppel limited accordingly: *Baker v. Wood*, 157 U. S. 212.

Assignee Takes Subject to What Equities.--It is a well-settled general rule of universal application that the assignee of a judgment stands in no better position than his assignor in regard to equities existing between the original parties to the judgment. Such assignee takes the judgment subject to all equities and defenses subsisting at the time of the assignment which the judgment debtor could have asserted against it in the hands of the judgment creditor, and it is immaterial whether the assignee had notice of such equities or defenses or not: *United States v. Samperyac*, Hemp. 118; *Wetumpka v. Wetumpka Wharf Co.*, 63 Ala. 611; *Wright v. Levy*, 12 Cal. 257; *Northam v. Gordon*, 23 Cal. 255; *Lockwood v. Bates*, 1 Del. Ch. 435, 12 Am. Dec. 121; *Rawson v. McJunkins*, 27 Ga. 432; *Scott v. Harkins*, 32 Ga. 302; *McJilton v. Love*, 13 Ill. 486, 54 Am. Dec. 449; *Hughes v. Trahern*, 64 Ill. 48; *Rea v. Forrest*, 89 Ill. 275; *Winslow v. Leland*, 128 Ill. 304; *Yarnell v. Brown*, 65 Ill. App. 83; *Robeson v. Roberts*, 20 Ind. 155, 83 Am. Dec. 308;

Isett v. Lucas, 17 Iowa, 503, 85 Am. Dec. 572; *Independent School Dist. v. Schriener*, 46 Iowa, 172; *Moore v. Smith*, 103 Mich. 387; *Brisbin v. Newhall*, 5 Minn. 273; *Rowe v. Langley*, 49 N. H. 395; *Stout v. Vankirk*, 10 N. J. Eq. 78; *Traphagen v. Lyons*, 38 N. J. Eq. 613; *Brown v. Hendrickson*, 39 N. J. L. 239; *Chamberlin v. Day*, 3 Cow. 353; *Jordan v. Black*, 2 Murph. 30; *Noble v. Thompson Oil Co.*, 79 Pa. St. 354, 21 Am. Rep. 66; *Mifflin Co. Nat. Bank's Appeal*, 98 Pa. St. 150; *Griffiths v. Sears*, 112 Pa. St. 523; *Shelton v. Hurd*, 7 R. I. 408, 84 Am. Dec. 564; *Ellis v. Kerr*, 11 Tex. Civ. App. 349; *Fleming v. Stansell*, 13 Tex. Civ. App. 558; *Dutton v. Mason*, 21 Tex. Civ. App. 389; *Downer v. South Royalton Bank*, 39 Vt. 25; *Blakesley v. Johnson*, 13 Wis. 530.

As examples of this rule it may be stated that after a contract for the discharge of a judgment is in process of execution, the owner thereof cannot, by an assignment of the judgment, divest or defeat the right of the debtor to a discharge under his contract, and on performance the judgment must be satisfied as to him: *Winslow v. Leland*, 128 Ill. 304. If a judgment once paid, but not satisfied of record, is assigned by the judgment creditor, the assignee takes it subject to all defenses and equities held by the judgment debtor against the assignor. He also takes it subject to liens and encumbrances intervening between the entry of the judgment and its assignment: *Traphagen v. Lyons*, 38 N. J. Eq. 613. A judgment creditor or his assignee cannot, after the judgment has been paid, in any way give it validity against the judgment debtor nor his creditors. The assignee takes it subject to all the equities between the original parties: *Stout v. Van Kirk*, 10 N. J. Eq. 78. The assignee takes the judgment subject to payments made by the judgment debtor before he has notice of the assignment: *Noble v. Thompson Oil Co.*, 79 Pa. St. 354, 21 Am. Rep. 66. The assignee of a judgment recovered in an attachment suit with notice that the property has been taken and converted by a third person under a claimant's bond takes it subject to all existing equities, including that of setoff to a judgment on the claimant's bond which could have been urged against the assignor: *Fleming v. Stansell*, 13 Tex. Civ. App. 558.

An assignee of a judgment usually takes subject to the right of the judgment debtor to set off any valid claim he may have against the judgment creditor. Although the cases are not universal in allowing the setoff, still the weight of authority maintains the right, the rule being that the setoff must be allowed or refused against the assignee of the judgment as to the court may seem equitable. Whenever the allowance of the setoff will promote substantial justice, the court will enforce the right as against the assignee of the judgment. A purchaser and assignee of a judgment, even for a valuable consideration and without notice, takes subject to the right of setoff existing at the time of the assignment: *Porter v. Liscomb*, 22 Cal. 430, 83 Am. Dec. 76; *Chamberlin*

v. Day, 3 Cow. 353; Brown v. Hendrickson, 39 N. J. L. 239; Graves v. Woodbury, 4 Hill, 559, 40 Am. Dec. 296; Duncan v. Bloomstock, 2 McCord, 318, 13 Am. Dec. 728; McBride v. Fallon, 65 Cal. 301; Yorton v. Milwaukee etc. Ry. Co., 62 Wis. 367; Langston v. Roby, 68 Ga. 406; Neal v. Sullivan, 10 Rich. Eq. 276; Ellis v. Kerr, 11 Tex. Civ. App. 349. A judgment may be set off against a cross-judgment to prevent an injustice, although the latter has been assigned to a third person: Hovey v. Morrill, 61 N. H. 9, 60 Am. Rep. 315. A judgment for costs in favor of a plaintiff on a second appeal may be set off on a similar judgment in favor of the defendant on a former appeal, although there has been an assignment of plaintiff's judgment: Yorton v. Milwaukee etc. Ry. Co., 62 Wis. 367. The assignee of a judgment takes it subject to the equitable right of the judgment debtor to set off against it a claim arising out of the same transaction, but which the debtor could not plead in the action resulting in the judgment, because it had not matured: Ellis v. Kerr, 11 Tex. Civ. App. 349.

The bona fide assignee of a judgment against two defendants may have a judgment recovered against him by one of them, after such assignment, set off against the assigned judgment, even though the second judgment is assigned to a third party for value, without notice of the first assignment. The assignee of the second judgment takes it subject to all existing equities, of which setoff is one: Brown v. Hendrickson, 39 N. J. L. 239. A judgment may be purchased and an assignment taken thereof merely for the purpose of setoff, if done bona fide, but not where the nominal assignee is a mere trustee: People v. New York Common Pleas, 13 Wend. 649, 28 Am. Dec. 495.

If a judgment has been in good faith and for a valuable consideration assigned to a third person before application for a setoff is made, such third person is the real party in interest, and no setoff is ordinarily allowed: Ramsey's Appeal, 2 Watts, 228, 27 Am. Dec. 301; Ullmann v. Kline, 87 Ill. 268; Ames v. Bates, 119 Mass. 397; Zogbaum v. Parker, 55 N. Y. 120; Ely v. Cooke, 28 N. Y. 365; Gallaher v. Pendleton, 55 Iowa, 142; Bell v. Perry, 43 Iowa, 368. Thus, the court will not order a judgment to be set off against one in favor of the defendant when the plaintiff has assigned it to his attorney to secure the payment of the latter's legal services, and the attorney, when he took the assignment, had no notice of the existence of the judgment which defendant seeks to set off: Simmons v. Reid, 31 S. C. 389, 17 Am. St. Rep. 36. Jurisdiction to set off one judgment against another is equitable in its nature, and will be allowed by the court only when good conscience requires it: Simmons v. Reid, 31 S. C. 389, 17 Am. St. Rep. 36; Dutton v. Mason, 21 Tex. Civ. App. 389. The assignee of a judgment bought without actual notice of any offsets thereto cannot be denied the right to enforce it by injunction proceedings in which the defendants seek to offset against it a judgment recently obtained by them

against plaintiff upon claims bought by them before the transfer for the purpose of being used as such offset. The fact that plaintiff is insolvent does not alter the case: *Dutton v. Mason*, 21 Tex. Civ. App. 389.

The assignee of a judgment is ordinarily charged with the inspection of the record of such judgment, and is therefore affected with notice of any rights which it plainly discloses: *Griffiths v. Sears*, 112 Pa. St. 523; *Hobbs v. Duff*, 28 Cal. 596. If the record of the judgment or the proceedings therein disclose an equitable right of setoff existing in favor of the defendant against the plaintiff, the assignee cannot claim to be a bona fide purchaser: *Hobbs v. Duff*, 23 Cal. 596; *Lockwood v. Bates*, 1 Del. Ch. 435, 12 Am. Dec. 121. The judgment debtor may estop himself against setting up an equity against the assignee either by express agreement, as where he gives a certificate that there is no defense against the judgment: *Scott's Appeal*, 123 Pa. St. 155; *Cook v. McCahill*, 41 N. J. Eq. 69; or by failing to avail himself of his defense in due time: *Doub v. Mason*, 2 Md. 380.

A well-established exception to the rule that the assignee of a judgment takes it subject to all equities and defenses exists as to equities between two parties to a judgment arising from other and independent transactions, and equities asserted by persons not parties to the judgment or their assignees. The assignee of the judgment does not take it subject to such equities: *Isett v. Brewster*, 17 Iowa, 503, 85 Am. Dec. 572; *Davis v. Milburn*, 3 Iowa, 163; *Hale v. First Nat. Bank*, 50 Iowa, 642. An assignee of a judgment is never affected by latent equities of third persons not parties to the judgment of which he had no notice at the time of the assignment: *Western Nat. Bank v. Maverick Nat. Bank*, 90 Ga. 339, 35 Am. St. Rep. 210; *Yarnell v. Brown*, 65 Ill. App. 83; *Starr v. Haskins*, 26 N. J. Eq. 414; *Garland v. Harrison*, 17 Mo. 282; *Hendrickson's Appeal*, 24 Pa. St. 363; *Appeal of Mifflin Co. Nat. Bank*, 98 Pa. St. 150; *Mellon's Appeal*, 96 Pa. St. 475; *Duke v. Clark*, 58 Miss. 465. The assignee of a judgment is not affected by notice to his assignor before the rendition of the judgment of an unrecorded deed, but he must have notice thereof himself in order to affect him: *Clark v. Duke*, 59 Miss. 575. On the reversal or vacation of a judgment assigned for value, the parties thereto must be restored to their original rights and liabilities, and in this respect the assignee stands in no better position than his assignor, and the judgment may be vacated in his hands for the same reasons that would justify its vacation in the hands of the assignor: *Weber v. Tschetter*, 1 S. Dak. 205. An action to set aside a judgment for want of jurisdiction may be maintained against the assignee thereof, and the original judgment creditor need not be made a party thereto: *Magin v. Lamb*, 43 Minn. 80, 19 Am. St. Rep. 216. And the assignee of a judgment by default takes it subject to the right of the defendant to have such default set aside, and to defend: North-

am v. Gordon, 23 Cal. 255. It is also a rule of law that the assignee of a judgment which is vacated on appeal takes no interest under the assignment: Bennett v. Lathrop, 71 Conn. 613, 71 Am. St. Rep. 222. A statutory action against an officer for treble the value of the property for a wrongful attachment is not assignable, and an assignment of a judgment obtained against an officer in such case, which is afterward reversed on appeal is not an assignment of the cause of action, nor of a subsequent judgment rendered in the case: Mumford v. Wright, 12 Colo. App. 214. If under a decree it is necessary to pay a sum of money into court in order to obtain certain rights, money so paid by a third person, who takes an assignment of all rights under the judgment as security, cannot, upon subsequent vacation of the judgment, be subjected to garnishment by a creditor of the person for whose use the money has been advanced. On failure of the consideration and security the assignee is entitled to a return of the money thus advanced: Merwin v. Fowler, 20 Wash. 587. On the reversal or vacation of an assigned judgment the debtor must be restored to his original status so far as this can be done without prejudice: McJilton v. Love, 13 Ill. 486, 54 Am. Dec. 449; Villa v. Weston, 33 Conn. 42; Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459. If after reversal the judgment has been reassigned to the plaintiff therein, he may proceed to recovery in a new trial unaffected by such assignment: Sinclair v. Stanley, 69 Tex. 718. If the assigned judgment is vacated on appeal, the assignee is generally entitled to recover the price paid therefor on the ground of failure of consideration: Emerson v. Knapp, 75 Mo. App. 92; Villa v. Weston, 33 Conn. 42. Nor is the assignee generally liable for costs of the appeal: Wolcott v. Holcomb, 31 N. Y. 125. It has been held, however, that an assignee of a judgment who has undertaken to assume all risks of collection cannot, on the reversal of the judgment, recover the consideration paid: Gore v. Poteet, 101 Tenn. 608.

Miscellaneous.—If a judgment creditor assigns part of his judgment, he cannot repudiate the contract, whether the debtor consents to the assignment or not: McMurray v. Marsh, 12 Colo. App. 95; and no matter whether the assignment was fraudulent or an honest transaction, it is binding on the judgment creditor, as well against himself as a third person taking a second transfer knowing the facts: Ford v. Rosenthal, 74 Tex. 28. An innocent assignee of a judgment is not affected by a champertous purchase thereof by his immediate assignor, and is entitled to enforce the judgment against the debtor: Cooke v. Pool, 25 S. O. 593. An assignee of part of a judgment is thereafter a party in interest, and such interest cannot be disposed of by any legal proceeding without giving him his day in court: Ex parte Wells, 43 S. O. 477. The assignee of a judgment to secure certain money advanced cannot

claim the judgment as security for other money advanced but not secured by the judgment: *Miller v. Klugh*, 29 S. C. 124; and a judgment for an entire sum cannot be divided by assignment, so as to entitle the assignee to separate process to enforce payment of the part assigned: *Hopkins v. Stockdale*, 117 Pa. St. 865.

McGEE v. HAYES.

[127 California, 838.]

GUARDIAN AND WARD—INCOMPETENTS—JURISDICTION TO APPOINT GUARDIAN.—In case of application for guardianship of an incompetent person, he must be served with proper notice of the time and place of the hearing, in order to give the court jurisdiction to make the appointment. An order and notice merely specifying the day of hearing without naming the hour or place is insufficient.

GUARDIAN AND WARD—INCOMPETENTS—NOTICE OF HEARING—WAIVER—PRESENCE OF INCOMPETENT.—Proper notice of the time and place of hearing of an application for the appointment of a guardian for an incompetent person, necessary to give the court jurisdiction to act, is not waived by the presence of such incompetent at the hearing.

GUARDIAN AND WARD—INCOMPETENTS—COLLATERAL ATTACK UPON JURISDICTION.—If proceedings for the appointment of a guardian for an incompetent person show upon their face that the court was without jurisdiction to make the order appointing such guardian, it is subject to collateral attack.

Shaw & Murry, Hannah & Miller, and Power & Alford, for the appellant.

Roth & McFadzean, R. F. Roth, and C. G. Lamberson, for the respondent.

THE COURT. Forcible entry and detainer. Trial by a jury and verdict for plaintiff, and judgment thereon that plaintiff be restored to the possession of the premises. Defendant appeals from the judgment and from an order denying his motion for a new trial.

The verdict was general, "that defendant had been guilty of forcible entry and forcible detainer of the lands described in the complaint, and that plaintiff is entitled to a restitution of the premises."

Appellant claims that the proceedings under which Hastings was appointed guardian were void, because: 1. No citation was ever issued or served; 2. If the order be treated as a citation, it is void for the reason that it did not state the time when

or the place where the defendant was required to appear; 3. The order was made and entered March 2, 1897, while the hearing was set for March 3d. It appears that, upon the petition of Hastings, it was adjudged that McGee "has become an incompetent person, and that it is necessary that a guardian of his estate and person should be appointed," and Hastings was accordingly so appointed. The order recites that he "was duly notified of the time and place of the hearing of the petition heretofore filed herein, and it appearing that the said William L. McGee appeared in person at the hearing of said petition, on this day, and requested that said petition be granted, it is therefore ordered," etc. The only citation issued was the order of the judge made on reading and filing the petition in which it was "ordered that Tuesday, the twenty-third day of February, 1897, be and the same is hereby appointed as the time (no place or hour mentioned) for hearing said petition, and it is hereby ordered that notice be given to said William L. McGee of the time and place of hearing said petition," etc. The only notice given or citation served was a copy of this order. On February 23d the court made an order "that the hearing of the aforesaid petition be and the same is hereby continued until Tuesday, March 3, 1897." The order appointing the guardian ~~was~~ is dated March 2, 1897, and is marked "Filed March 2, 1897." The guardian took the oath of office and filed his bond on March 2, 1897, and letters of guardianship were issued to him that day. When these various proceedings were offered in evidence defendant objected to their admission on several specific grounds, challenging their competency, relevancy, and materiality. Respondent contends that the personal presence of the incompetent at the hearing cured any defects in the notice or service of the notice; and that by his presence he consented to the order and waived notice, and that the order so shows on its face. The presence of the incompetent could not supply the requirement of the statute that he should be served with notice of the hearing; he was incapable by reason of his incompetency to consent to the jurisdiction of the court or waive any other steps necessary to confer jurisdiction upon the court or to make any request that the petition be granted.

Upon the filing of the petition the court or judge "must cause a notice to be given to the supposed insane or incompetent person of the time and place of hearing the case, not less than five days before the time so appointed; and such person, if able to attend, must be produced on the hearing": Code Civ. Proc., sec. 1763.

The statute requires the personal presence of the incompetent, if it can be had, as well as that notice of the hearing of the petition be given him. If the order may be treated as a notice, and a copy of it may be served as a notice, it is requisite that it should state the time and place of the hearing. In the present case the order fixed February 23d "as the time for the hearing," but it directed "notice to be given of the time and place of hearing said petition." This direction was not complied with by simply serving a copy of the order in the form given. But if the notice to appear February 23d could be treated as sufficient, and the adjournment of the hearing to March 3d could also be held sufficient, the court had no authority to hear the petition March 2d and make the appointment, as the record shows was done. Counsel for respondent states in his brief, but it does not elsewhere appear that "the 3d of March, 1897, did not fall upon a Tuesday, but upon a Wednesday, and the hearing of the matter was intended by the court to be continued to ~~33d~~ Tuesday, March 2, 1897, on which last-named day the hearing was had." If we were permitted to reject the day of the month named (March 3d) and take the day of the week named (Tuesday), the order would fail to show what Tuesday. There are many Tuesdays in the year, but there is but one March 3d. We do not think we are authorized to reject a definite time and accept one so indefinite. The order was prematurely made and was without authority.

The attack is collateral, it is true, but the proceedings disclose all the steps taken to confer jurisdiction, from which it clearly appears on the face of the record that the court was without jurisdiction to make the order. In such case the order could be attacked collaterally: *Pioneer Land Co. v. Maddux*, 109 Cal. 633, 640, 50 Am. St. Rep. 67; 1 Freeman on Judgments, sec. 130.

As plaintiff's right to maintain the action depends upon the authority of the guardian, it follows that the judgment and order denying a new trial should be reversed, and it is so ordered.

GUARDIAN—NOTICE OF APPOINTMENT.—The appointment of a guardian for a lunatic without notice to her, and without the issue of a writ de lunatico inquirendo, and the verdict of a jury thereon, is void, and may be impeached collaterally: *Eslava v. Lepretre*, 21 Ala. 504, 56 Am. Dec. 266. But a voluntary appearance cures want of notice of an inquest of lunacy: *Rogers v. Walker*, 6 Pa. St. 371, 47 Am. Dec. 470. See further, *Evans v. Johnson*, 39 W. Va. 299, 45 Am. St. Rep. 912; *Hutchins v. Johnson*, 12 Conn. 376, 30 Am. Dec. 622; *Kimball v. Fisk*, 39 N. H. 110. 75 Am. Dec. 213.

WILLIAMS v. RIEHL

[127 California, 365.]

SURETYSHIP—JUDGMENT AGAINST SURETIES—ELECTION OF PROCEDURE.—A portion of the sureties upon a guardian's bond who have paid a judgment against the guardian and all of the sureties may enforce contribution from the remainder of the sureties by proceeding against them in the manner provided by statute, or they may take a written assignment of the judgment from the plaintiff therein upon payment thereof, and enforce it in his name by execution against each of the other sureties for his proportionate share of the debt.

JUDGMENTS—JOINT DEBTORS—SATISFACTION.—The mere payment of a judgment by one joint debtor does not operate as an accord and satisfaction as to other joint judgment debtors, unless it plainly appears that the payment was to have that effect. This rule is here applied to cosureties.

SURETYSHIP—CONTRIBUTION—INDEMNITY.—A surety holding indemnity, who has paid the debt of his principal, can maintain an action against his cosurety for the sum he is then entitled to as contribution, regardless of the indemnity.

SURETYSHIP—CONTRIBUTION.—If a surety pays a judgment against his principal and takes a written assignment thereof, he can enforce it against any other cosurety only for his aliquot part of the debt based on the whole number of sureties, and execution on such judgment cannot be allowed against any surety for an amount in excess of his legal proportion of the debt.

SURETYSHIP—PRESUMPTION OF SOLVENCY.—In an action by one surety to enforce contribution from his cosureties, it is presumed that all of the sureties are solvent, and if some of them are insolvent equity will place the burden equally upon the solvent sureties.

J. B. Devine, for the appellant.

G. L. Johnson, W. M. Sims, A. M. Johnson, A. J. Hull, and T. Watt, for the respondent.

337 COOPER, C. The defendant Riehl was the guardian of the estate of one Carver, a minor, and as such guardian executed a bond, as required by the order of the court in which the proceedings were pending, in the penal sum of \$25,000, with the following named sureties for amounts named, respectively, to wit: F. S. Smith, for \$25,000; George Peters, \$5,000; William Johnston, \$5,000; Stanton Myers, \$5,000; Jacob Gebert, \$5,000; D. T. Lufkin, \$5,000, and Patrick Kelly, \$5,000. Carver died, and plaintiff was appointed and qualified as administrator of his estate. The final account of defendant Riehl as such guardian was regularly settled and it was ascertained by the court that he had in his hands belonging to his ward the sum of \$10,000,

with interest, which amount he was directed to pay. The amount not having been paid, the plaintiff brought this action against the defendant Riehl and the other defendants who are sureties on his bond, and on the eleventh day of March, 1898, the plaintiff recovered judgment against defendant Riehl, the guardian, in the sum of \$10,267, and against defendant Smith in the same amount, and against the other defendants in the sum of \$5,000 each. The plaintiff, as administrator of the estate of said Carver, and by permission of the court in which the estate was pending, agreed to accept \$9,500 in full payment of his judgment, and the amount was paid to plaintiff on the twenty-seventh day of April, 1898, by defendants Johnston, Smith, and Lufkin, and at their request the plaintiff executed and delivered to them a written assignment of the judgment authorizing them to enforce the same in the name of the plaintiff as such administrator. This assignment was filed with the clerk of the court and with the papers in this action. After the said assignment was filed the defendants, who paid the judgment and to whom the said assignment was made, applied to the clerk and the clerk issued a writ of execution directed to the sheriff of Sacramento county commanding him to levy upon ~~the~~ the property of the defendant Kelly and cause to be made out of the same the sum of \$5,000, besides interest and costs. The sheriff to whom the writ was directed proceeded to levy upon the property of defendant Kelly and noticed the same for sale. Kelly, after giving notice, moved the court below to recall and quash the writ of execution, and for an order directing satisfaction of the judgment to be entered. The court denied the motion and refused to make the order. The court further ordered that the writ of execution be amended so as to run against Kelly for \$1,875 only. The defendant Kelly has appealed from the order so made and from the order refusing to recall the execution.

1. It is claimed by appellant that the defendants Smith, Johnston, and Lufkin, who will hereafter be called the respondents, having failed to comply with the provisions of section 709 of the Code of Civil Procedure, cannot proceed under the judgment by obtaining an execution thereon to enforce contribution from him. The section is as follows: "When property, liable to an execution against several persons, is sold thereon, and more than a due proportion of the judgment is satisfied out of the proceeds of the sale of the property of one of them, or one of them pays, without a sale, more than his proportion, he may

compel contribution from the others; and when a judgment is against several, and is upon an obligation of one of them, as security for another, and the surety pays the amount, or any part thereof, either by sale of his property or before sale, he may compel repayment from the principal; in such case, the person so paying or contributing is entitled to the benefit of the judgment to enforce contribution or repayment, if, within ten days after his payment, he file with the clerk of the court where the judgment was rendered notice of his payment and claim to contribution or repayment. Upon a filing of such notice the clerk must make an entry thereof in the margin of the docket."

Respondents do not claim to have complied with said section as to filing with the clerk of the court the notice as therein provided, or as to having an entry made in the margin of the docket, but they claim that, independent of said section, by virtue of the written assignment to them of the judgment, they have the right to an execution to enforce contribution from the ³⁶⁹ appellant. We think the contention of respondents as to this point correct. The section is somewhat obscure, and the first part of it, down to the word "principal," only lays down fundamental rules as to the rights of sureties and joint judgment debtors to compel contribution. The latter part of the section "in such case the person so paying or contributing is entitled to the benefit of the judgment to enforce contribution or repayment, if within ten days," etc., is the portion that contemplates giving to sureties or joint judgment debtors the right to an execution in the original proceedings. The section was, no doubt, enacted for the benefit of sureties and joint judgment debtors in order to enable them, without bringing an action, to use the judgment and the writs of the court for the purpose of compelling, in the case of sureties, the repayment from their principal, or contribution from cosureties, and, in case of joint judgment debtors, contribution from their codebtors.

The legislature evidently did not have in mind a case where the parties paying the judgment procured a written assignment of it. The plaintiff, being the owner of the judgment, had the right to assign it to anyone upon payment of the amount authorized by the order of the court in which the estate was pending. The fact that the parties paying it were some of the judgment debtors would not prevent them from taking an assignment of it. The section is substantially the same and in almost the exact words of section 480 of the Civil Code of Kansas. The

supreme court of that state, in *Harris v. Frank*, 29 Kan. 203, has placed a similar construction upon section 480 of its code. In the opinion it is said: "Besides said section 480 of the Civil Code was not enacted for the purpose of giving assignees of judgments a remedy as assignees. They have a remedy independent of such section, and could enforce their judgment if such section had never been enacted. Said section was really enacted for the benefit of sureties, and for the benefit of joint judgment debtors, without reference to whether any assignment had been made or not."

The cases of *Davis v. Heimbach*, 75 Cal. 261, and *Clark v. Austin*, 96 Cal. 283, are not in conflict with what has here been said. In neither case was there any assignment of the judgment to the parties seeking to enforce contribution.

370 2. The payment of the judgment by respondents to plaintiff did not amount to a satisfaction of the same as against their cosureties or the principal. The rule is, that the mere payment of a judgment by one joint debtor does not operate as an accord and satisfaction of the judgment as to other joint judgment debtors, unless it plainly appears that the payment was intended to have such effect: *Brandt on Suretyship and Guaranty*, sec. 275; *Brown v. White*, 29 N. J. L. 514, 80 Am. Dec. 226; *Coffee v. Tevis*, 17 Cal. 239; *Freeman on Executions*, sec. 444.

3. The affidavit of appellant used on the motion states on information and belief that prior to the issuance of the execution, the defendant Riehl transferred to respondents real and personal property of the value of \$5,000, which they had and held in their possession at the time of the hearing of the motion. It is further stated in the affidavit on information and belief that the said real and personal property was so transferred in part payment of the \$9,500, but it is not stated as to whether any price was agreed upon or as to the amount of the \$9,500 the transfer would pay. We must therefore, from the record, presume that the transfer was of real and personal property, to be held as indemnity to the extent of its value.

There is a sharp conflict in the authorities as to whether a surety holding in his hands indemnity can maintain an action against his cosurety regardless of the indemnity. Many authorities hold that the surety may maintain an action against his cosurety for the sum he is then entitled to, regardless of the indemnity. That in such case, whatever may be afterward received by a sale of the indemnity shall be accounted for and proportionately paid to the sureties. On the other hand, it has

been held in several cases that the surety so indemnified must save himself harmless or fully account for the value of the indemnity before he can recover against his cosurety in an action for contribution. The question does not appear to have been decided by this court, and we are at liberty to lay down the rule in this case. We think the first the better rule. Equality is equity. The moment one cosurety or joint judgment debtor pays the debt of his principal he has a right to recover from his cosurety or joint judgment debtor his proportionate share. The law gives him this right and also imposes ^{§71} upon his cosurety the duty of paying his proportionate share. The obligation is as binding upon the cosurety as if created by promissory note or contract. It would be no defense for a defendant, when sued upon a promissory note or other written contract, to set up that the plaintiff held collateral securities or property for the purpose of indemnifying himself. Why should it be a defense in this kind of an action? Why should the plaintiff, in an action for contribution, after having paid out his money, be compelled to wait until he can realize upon some collateral indemnity which may require years, while his cosurety, who was as much bound in law and morals as himself by the bond, has paid nothing? This would not make the burdens of the cosureties equal. The indemnity is for the benefit of one cosurety as much as for the other, no matter which holds it: Civ. Code, sec. 2849. Either one could apply to the court for its sale, or to enjoin a wrongful disposition of it. The burden of finding a market for it and applying its value toward the debt of the principal should be borne by one as well as the other. There is no reason why the cosurety who has paid the debt of his principal should assume the burden of disposing of the indemnity, and the additional burden of waiting until it is disposed of, before he can receive from his cosurety his proportion. The views we have here given are supported by the following authorities: Brandt on Suretyship and Guaranty, sec. 274; Paulin v. Kaighn, 29 N. J. L. 483; Anthony v. Percifull, 8 Ark. 495; Bachelder v. Fiske, 17 Mass. 464; Johnson v. Vaughn, 65 Ill. 425.

4. Appellant contends that the execution as modified was for too great a sum, and in this we think he is correct. The respondents, by paying the plaintiff and taking an assignment of the judgment, only became entitled to use it for the purpose of enforcing contribution from their cosureties or payment from their principal. They were only subrogated to the rights

of the plaintiff for the purpose of using the judgment in order to protect themselves and their cosureties, and for the purpose of compelling contribution. This is not a proceeding in equity, and no claim is made that any cosurety is insolvent. The law presumes that they are solvent. Respondents, therefore, were entitled to execution against appellant for an aliquot part of the ³⁷² debt based on the whole number of cosureties. They are liable to contribute in the proportion of the respective amounts or penalties for which they became surety: Brandt on Suretyship and Guaranty, sec. 288; Armitage v. Pulver, 37 N. Y. 499; notes to Deering v. Earl of Winchelsea, 1 White & Tudor's Lead. Cas. Eq., pt. 1, p. 124, et seq.; Cowell v. Edwards, 2 Bos. & P. 268. Applying this rule the appellant was responsible for one-eleventh of the \$9,500, which is \$863.63. If the other sureties are insolvent, or if any one of them is insolvent, the respondents can bring their action for contribution and all matters can be determined so that justice will be done and the burden equally placed upon the solvent sureties.

We advise that the court below be directed to amend and modify its order so that it direct the writ of execution to run against appellant for \$863.63, and interest at the legal rate since the twenty-seventh day of April, 1898, and for costs, and that as so amended and modified it be affirmed.

Britt, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the court below is directed to amend and modify its order so that it direct the writ of execution to run against appellant for \$863.63, and interest at the legal rate since the twenty-seventh day of April, 1898, and for costs, and that as so amended and modified it is affirmed.

McFarland, J., Temple, J., Henshaw, J.

SURETIES—CONTRIBUTION AMONG.—A surety who has paid a judgment against himself and his cosureties may take an assignment of it to himself and avail himself of it to enforce contribution from his nonpaying cosureties: Merchants' Nat. Bank v. Great Falls etc. Co., 23 Mont. 33, 75 Am. St. Rep. 499.

INSOLVENT SURETY—CONTRIBUTION.—If a surety liable to contribution is insolvent, contribution must be in proportion to the number of solvent sureties: Sloan v. Gibbes, 56 S. C. 480, 76 Am. St. Rep. 559. See, further, the monographic note to Culliford v. Walser, 70 Am. St. Rep. 451-454.

INDEMNIFIED SURETY—CONTRIBUTION.—If it appears that a paying surety has been indemnified to the full extent of payments made by him, he is not entitled to contribution from his cosureties, but must indemnify himself out of the means placed

in his hands: See the monographic note to *Gross v. Davis*, 10 Am. St. Rep. 642.

THE PAYMENT OF A JUDGMENT BY ONE OF SEVERAL DEFENDANTS, and the taking of an assignment to them or a third person, does not operate as a satisfaction of the judgment in favor of the defendants not making such payment, unless it appears that the payment was intended to operate as a complete satisfaction of the judgment: *Brown v. White*, 29 N. J. L. 514, 80 Am. Dec. 226.

PATTON v. BOARD OF HEALTH OF SAN FRANCISCO.

[127 California, 888.]

OFFICERS—REMOVAL.—The legislature may authorize the employment of persons to perform certain duties in their nature public, to be prescribed by the authority appointing them, and may provide that they shall not be removed without just cause, if the employment is not an office within the meaning of the constitution, but it has no power to make such provision in relation to a public officer whose tenure of office is during the pleasure of the appointing power.

AN OFFICE IS A PUBLIC POSITION created by the constitution or law, continuing during the pleasure of the appointing power or for a fixed term, with a successor elected or appointed. An employment is an agency for a temporary purpose, ceasing when that purpose is accomplished.

OFFICERS—WHO ARE.—If the legislature creates the position, prescribes the duties, and fixes the compensation, and such duties pertain to the public and are continuing and permanent, and not occasional or temporary, the position or employment is an office, and he who occupies it is an officer.

OFFICERS—HEALTH INSPECTOR—REMOVAL WITHOUT CAUSE.—A health inspector required to be appointed by a board of health, whose duties are fixed by such board, and whose salary is provided for by law, is a public officer within the meaning of the constitution, and if his tenure of office is not fixed, but is subject to the pleasure of such board, he may be removed from office without just cause or an opportunity to be heard.

G. W. McEnerney and S. M. Ehrman, for the appellants.

J. P. Langhorne, W. F. Fitzgerald, and A. T. Patton, in propria persona, for the respondent.

891 **CHIPMAN, C.** Plaintiff brings this action against the board of health of the city and county of San Francisco for a writ of mandate requiring it to admit plaintiff to the position of health inspector and to approve certain of his demands on the treasury for salary accruing since his removal.

The court found as facts that the board of health appointed plaintiff on August 6, 1895, as one of the six health inspectors

provided to be appointed by section 3009 of the Political Code; that the board of health, in its order appointing plaintiff, did not specify or in any manner limit the term for which plaintiff should hold or exercise the position; that plaintiff entered upon the discharge of his duties pursuant to such appointment, and discharged the duties required of him by the board until about November 6, 1896, at which time, and while plaintiff was proceeding to perform his duties, the board passed a resolution purporting by its terms to remove plaintiff from his said position, "but the said resolution was so passed without plaintiff's knowledge or consent, and without any notice to him that any charge whatever had been made against him, or that any charge against him would be heard by said board, . . . and plaintiff had no opportunity to be heard in his own behalf before said board of health or its members before the passage of said resolution." It is further found that solely upon the authority of said resolution plaintiff has been denied his right to be and act as such health inspector, and has been deprived of the emoluments pertaining to said position; that the duties of plaintiff as such inspector, prescribed by the board, were "to inspect premises concerning which complaints have been made to said board, and to report thereon to said board, and to serve notices issued by said board to persons to abate nuisances on their premises."

As conclusions of law, the court found that plaintiff has never been legally removed from the position of health inspector, and that he is still one of the six health inspectors appointed by the board of health August 6, 1895, and that "it is not material whether plaintiff was guilty of insolence, insubordination, or neglect, as he had no trial on said charge or charges"; that plaintiff is not an officer or commissioner within the meaning ³⁹² of section 16, article 20, of the constitution of this state, and that plaintiff is entitled to the writ, etc. At the trial plaintiff testified: "When I became health inspector no written commission was issued to me. I took no oath of office, nor filed any bond." Plaintiff had judgment, from which and from the order denying new trial defendant appeals. Appellant relies principally upon the following proposition: The plaintiff's term of office as health inspector not having been fixed by the constitution or by law, he held at the pleasure of the appointing power; and that portion of section 3009 of the Political Code prohibiting his removal without just cause is unconsti-

tutional and void, because in violation of section 16, article 20, of the constitution.

This provision of the constitution reads as follows: "When the term of any officer or commissioner is not provided for in this constitution, the term may be declared by law; and, if not so declared, such officer or commissioner shall hold his position as such officer or commissioner during the pleasure of the authority making the appointment; but in no case shall such term exceed four years." It is conceded that the term of the position of health inspector is not prescribed either in the constitution or by any law. Section 3009 of the Political Code contains the following, among other, provisions: "The board of health must appoint six health inspectors, whose duties must be fixed by the board of health. . . . The appointing power aforesaid is vested solely in said board of health, and said board shall have power to prescribe the duties of said appointees [referring to health inspectors and many other appointees], and shall not remove the same without just cause." It cannot be doubted that the legislature may authorize the employment of persons to perform certain duties in their nature public, to be prescribed by the authority making the appointment of such persons, and may provide in the law that such persons shall not be removed without just cause, if the employment is not an office within the meaning of the constitution; and it is well settled that under such a clause in the statute the appointee is entitled to notice and opportunity to be heard before he can be legally removed: *Kennedy v. Board of Education*, 82 Cal. 483; *Marion v. Board of Education*, 97 Cal. 608; *Fairchild v. Board of Education*, 107 Cal. 92.

~~303~~ With the policy of such a law we have nothing to do; its wisdom or unwisdom is for the legislature alone to determine. We are only concerned, in the present case, with the question, Is the health inspector an officer within the meaning of the provision of the constitution above quoted?

Many of the cases and authors giving definitions of the word "office" and "officer" as used in statutes and constitutions will be found cited in chapter 1 of Mechem on Public Offices and Officers. Counsel in their briefs have called attention to some others. I do not think it possible from this mass of learning to deduce a definition universally applicable, although nearly every conceivable case has arisen and has been passed upon. It seems to be agreed by all writers that certain things are requisite to make a given employment a public office and its incum-

bent a public officer. Then there are numerous criteria, which, while not in themselves conclusive, are yet held to indicate more or less strongly the legislative intent to create or not to create an office. One of the requisites is that the office itself must be created by the constitution of the state or it must be authorized by some statute. The section of the constitution in question embraces all classes of officers, statutory as well as constitutional: *People v. Perry*, 79 Cal. 105. But not all employments authorized by law are public offices in the sense of the constitution. The presidency of a private corporation may be spoken of as an office; an executor, guardian, a referee for the decision and trial of an action, are all officers who derive their existence from statutes, but they are not public officers in the constitutional sense; "their authority is restricted to specific matters, and no general powers are conferred upon them authorizing them to act in respect of all cases, or in any case or matter other than specified and named in their appointment. They owe no duty to the public, and could perform no service for the public. . . . 'Public office,' as used in the constitution, has respect to a permanent trust to be exercised in behalf of the government, or of all citizens who may need the intervention of a public functionary or officer, and in all matters within the range of the duties pertaining to the character of the trust. It means a right to exercise generally, and in all proper cases, the functions of a public trust or employment, and to receive ~~304~~ the fees and emoluments belonging to it, and to hold the place and perform the duty for the term and by the tenure prescribed by law": *In re Hathaway*, 71 N. Y. 238. Danforth, J., in *Rowland v. Mayor*, 83 N. Y. 376, said: "Whoever has a public charge or employment, or even a particular employment affecting the public, is said to hold or to be in office." Platt, J., in *Matter of Oaths*, 20 Johns. 492, speaks of "office" as "an employment on behalf of the government in any station or public trust, not merely transient, occasional, or incidental." Pearson, C. J., in *State v. Stanley*, 66 N. C. 59, 8 Am. Rep. 488, said: "A public office is an agency for the state, and the person whose duty it is to perform this agency is a public officer. . . . The essence of it is the duty of performing an agency—that is, of doing some act or acts, or series of acts, for the state." It has hence been held by most courts, as was said in the opinion of the judges, given to the governor, reported in appendix to 3 Me. 481: "The term 'office' implies a delegation of a portion of the sovereign power to, and possession of it by, the person

filling the office, and the exercise of such power, within legal limits, constitutes the correct discharge of the duties of such office." The opinion proceeds to further point out the distinction between an office and an employment under the government. "The power thus delegated and possessed may be a portion belonging to some one of the three great departments, and sometimes to another; still, it is a legal power, which may be rightfully exercised, and in its effects it will bind the rights of others, and be subject to revision and correction only according to the standing laws of the state. An employment merely has none of these distinguishing features. A public agent acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give the acts performed the authority and power of a public act or law. And if the act be such as not to require such subsequent sanction, still it is only a species of service performed under the public authority and for the public good, but not in the execution of any standing laws, which are considered as the rules of action and the guardians of rights." In *United States v. Maurice*, 2 Brock. 96, Chief Justice Marshall, in determining that the "agent of fortifications" is an officer of the United States, said: "An office ³⁹⁵ is defined to be 'a public charge or employment,' and he who performs the duties of the office is an officer. . . . Although an office is 'an employment,' it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act or perform a service without becoming an officer. But if the duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters on the duties appertaining to the station without any contract defining them, if those duties continue, though the person be changed—it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer. If it may be converted into a contract, it must be a contract to perform the duties of the office of agent of fortifications, and such an office must exist with ascertained duties, or there is no standard by which the extent of the condition can be measured." Judge Cooley distinguished the "officer" from the "employé" in the "greater importance, dignity, and independence of his position; in being required to take an official oath, and perhaps to give an official bond; in the liability to be called to account as a public offender for misfeasance or nonfeasance in office, and

usually, though not necessarily, in the tenure of the position": *Throop v. Langdon*, 40 Mich. 673. But it has been held that an oath of office is not a necessary criterion; nor is salary. These are but incidents and form no part of the office, though they may aid in determining the nature of the position. Duration or continuance have been said to be embraced in the term "office," and Chief Justice Marshall, in the case cited, spoke of the duty being a continuing one as an important element. But Chief Justice Pearson, in the North Carolina case cited, said "that it made no difference whether there be but one act or a series of acts to be done—whether the office expires as soon as the one act is done, or is to be held for years or during good behavior"—the service being performed for the state. Our court at an early day, in *Vaughn v. English*, 8 Cal. 40, held that the clerks in the offices of secretary of state and controller and treasurer of state were officers within the meaning of the act of April 21, 1856: Stats. 1856, p. 224. It was there said: "The term ³⁹⁶ 'officer,' in its common acceptation, is sufficiently comprehensive to include all persons in any public station or employment conferred by government." The definition given in 4 Jacob's Law Dictionary, 433, was quoted as follows: "It is said every man is a public officer who hath any duty concerning the public, and he is not the less a public officer where his authority is confined to narrow limits, because it is the duty of his office and the nature of that duty which makes him a public officer, and not the extent of his authority." The opinion continues: "The respondent was appointed by government; the duties which he is to perform concern the public, and he is paid out of the public treasury; he is, therefore, a public officer." It was held that because there was no definite term of the office could not be urged as an objection, for the clerks are appointed for the term of the officer making the appointment, subject to the power of removal.

It was held in *United States v. Germaine*, 99 U. S. 508, that civil surgeons appointed by the commissioner of pensions are not officers of the United States, because they are not appointed by a head of a department, nor are the appointments approved by such head, and this distinguished the case from *United States v. Hartwell*, 6 Wall. 385, where it was held that a clerk in the office of the assistant treasurer of the United States is an officer within the meaning of the act of Congress of June 14, 1866 (14 Stats. at Large, 65), punishing embezzlement. It was there said: "An office is a public station, or employment, con-

would continue if the incumbents were removed or for any cause ceased to act. The health inspector is invested with some portion of the sovereign functions of government, to be exercised for the benefit of the public; his duties are not prescribed by contract, but are defined by the government through the board of health, and we find in the employment all the elements ³⁹⁹ mentioned in *United States v. Hartwell*, 6 Wall. 385, viz., tenure, duration, emoluments, duties, and a compensation fixed by law. The element of duties to be performed involved in the creation of an office under all definitions and under most of the decisions was not directly determined by the legislature; to the board was delegated the power to prescribe the duties. But many cases hold, we think properly, that an employment may be none the less an office, although the duties are to be prescribed by a superior officer.

"The board of health have general supervision of all matters appertaining to the sanitary condition of the city and county," etc.: Pol. Code, sec. 3012; their powers and duties are large and important, and the statute authorizes the board to devolve upon the health inspectors such portion of these powers and duties as the board may deem best for the good of the public service. So far as the evidence shows, the duties thus delegated to the inspectors are not extensive, but they cannot be said to be unimportant or purely ministerial, or lacking in the requirements of judgment and discretion; and the board may at any time enlarge them. It is difficult to take this case out of the rules which governed the case of *Quigg v. Evans*, 121 Cal. 546, or the case of *United States v. Hartwell*, 6 Wall. 385, or *United States v. Maurice*, 2 Brock. 96, or the principles laid down in the opinion of the judges reported in 3 Me. 481, or to distinguish it from *Vaughn v. English*, 8 Cal. 40.

In the case of *Kennedy v. Board of Education*, 82 Cal. 483, it was conceded by both parties and assumed by the court in the majority opinion that the position of teacher in the public schools of the city and county of San Francisco is not an office, and hence that case cannot aid us in reaching a decision here.

Our conclusion is that the intention of the legislature was to make the health inspectors officers within the meaning of the constitution, and, having failed to declare the term of the office, they hold during the pleasure of the board of health: *People v. Perry*, 79 Cal. 105; *People v. Hill*, 7 Cal. 97; *Smith v. Brown*, 59 Cal. 672.

It is advised that the judgment be reversed, with directions to dismiss the writ.

Cooper, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed, with directions to dismiss the writ.

Harrison, J., Garoutte, J., McFarland, J., Henshaw, J.

Rehearing denied.

OFFICE DISTINGUISHED FROM EMPLOYMENT.—Office is a right to exercise a public function or employment and take the emoluments belonging to it. It involves the idea of tenure, duration, fees, or emoluments, and powers, as well as that of duty; and implies an authority to exercise some portion of the sovereign power of the state. An officer is distinguished from an employé in the greater importance, dignity, and independence of his position, in being required to take an official oath, and perhaps give an official bond, in liability to be called to account as a public offender for misfeasance, and usually in the term of his office: See the monographic notes to *State v. Hocker*, 63 Am. St. Rep. 181-193; *Shelby v. Alcorn*, 72 Am. Dec. 179-189.

GRUNDEL v. UNION IRON WORKS.

[127 California, 438.]

TORTS.—LIABILITY OF TORT FEASORS for the same tort is joint and several. They may be sued jointly or severally, and judgment recovered against one of them remaining unsatisfied is no bar to an action against the other for the same tort.

TORTS.—LIABILITY OF TORT FEASORS.—In an action to recover for death caused by the wrongful act of several defendants, the fact that part of them availed themselves in a federal court of the limited liability fixed by federal statute, and that plaintiff appeared therein to claim damages, is no bar to his right to maintain suit in the state court against the other tort feasors while the action is pending in the federal court, provided he has not received satisfaction in any form or amount.

Sullivan & Sullivan, for the appellant.

Wilson & Wilson and Andros & Frank, for the respondents.

VAN DYKE, J. The plaintiff brings this action under section 377 of the Code of Civil Procedure of this state, as administrator of the estate of Frank Grundel, deceased, to recover damages on account of the death of the latter, occasioned by the wrongful acts of the defendants. Eighteen defendants were

named in the complaint, five of whom are fictitious, and no person appeared or answered in their name. The corporation defendant answered separately, and the twelve other defendants, represented by other attorneys, also appeared and answered. Nine of these twelve subsequently filed a supplemental answer setting forth that they were the owners of the schooner "Gracie S," on or about which the injury occurred, and had made application in the United States district court of the northern district of California for limitation of liability under the provisions of the Revised Statutes of the United States in reference to American merchant marine, and that upon filing their petition in said court a monition was issued in the usual form and served upon the plaintiff and his attorneys, and all persons claiming damages resulting from the accident mentioned in the plaintiff's complaint; and the said court enjoined plaintiff from any further proceedings in the suit in the superior court against the nine defendants claiming to be the owners of said vessel. An appraisement of the schooner was made, the value being fixed ⁴⁴⁰ at twelve thousand five hundred dollars. The plaintiff filed his answer in the United States district court to the petition of said nine defendants, but said cause has never been tried in the admiralty court, and is still pending.

The plaintiff made no further attempt to proceed in the superior court against the alleged owners of the vessel, but as to the other defendants who had appeared, to wit, the Union Iron Works, Barber, Castle, and Swanson, the plaintiff elected to proceed to trial in the said court. The case was regularly on the calendar of the superior court for trial December 2, 1897, whereupon the defendant the Union Iron Works moved the court to dismiss the action as to it, on the ground that nine of the defendants had instituted proceedings in the federal court for limitation of liability, and that said defendant Union Iron Works was sued as a joint tortfeasor with said nine defendants in whose behalf the restraining order had been issued against the plaintiff from proceeding to trial. The court took the motion under advisement, and the trial of the action was continued till April 4, 1898, at which time plaintiff endeavored to proceed with the trial as to said defendants other than the nine who were the owners of said vessel. The Union Iron Works thereupon renewed its motion to dismiss the action upon the grounds stated, and said defendants Barber, Castle, and Swanson, also on the same grounds, moved to dismiss the action. The court granted the motion of said four defendants, and a judgment of

dismissal was accordingly entered. The appeal is from this judgment of dismissal, on a bill of exceptions.

The question presented on the appeal is whether the plaintiff, with a cause of action, alleged in the complaint to be for fifty thousand dollars damages, is barred from recovery of a proper measure of damages as against the respondents herein, in consequence of the proceedings in the federal court by the nine defendants, the owners of said vessel, in which their liability is limited to the appraised value of said vessel.

The plaintiff has not actually received satisfaction in any amount, nor what in law is deemed the equivalent of satisfaction.

The law as to the liability of joint tort feors is thus stated by Black on Judgments: "The general rule followed in America ⁴⁴¹ is that the liability of two or more persons who jointly engage in the commission of a tort is joint and several, and gives the same rights of action to the person injured as a joint and several contract. Consequently, a judgment recovered against one of two joint tort feors, remaining unsatisfied, is no bar to an action against the other for the same tort": 2 Black on Judgments, sec. 777. Judge Cooley, in his work on Torts, second edition, 159, says: "The rule laid down by that eminent jurist, Kent, in *Livingston v. Bishop*, 1 Johns. 290, 3 Am. Dec. 330, which has since been generally followed in this country, is that the party injured may bring separate suits against the wrongdoers and proceed to judgment in each, and that no bar arises to any of them until satisfaction is received. . . . It is to be observed in respect to the point above considered, where the bar accrues in favor of some of the wrongdoers, by reason of what has been received from or done in respect to one or more of the others, that the bar arises, not from any particular form that the proceeding assumes, but from the fact that the injured party has received satisfaction, or what in law is deemed the equivalent." In *Dawson v. Schloss*, 93 Cal. 199, the plaintiff had recovered a judgment in the sum of five thousand dollars against Schloss and Hinkle in an action for malicious prosecution. A new trial was granted as to defendant Schloss, which resulted in a verdict and judgment against Schloss for three thousand dollars, and he appealed from the judgment. At the time of the second trial the original judgment for five thousand dollars against Hinkle was of record and unsatisfied. It was contended by the appellant that no judgment should have been rendered against Schloss on the new trial, so long as the orig-

inal judgment existed against Hinkle; that while separate suits may be brought against each of joint tort feasons, yet that, if the defendants are sued jointly, there can be but one verdict and judgment. This court answered this contention that "such is not the prevailing rule in the United States," quoting from Judge Cooley the above-cited paragraph. The court, continuing, says: "There is no pretense that any part of the judgment against Hinkle has been paid or satisfied, or even that execution has been taken out upon the judgment." *Nichols v. Dunphy*, 58 Cal. 605, was an action in tort. A judgment had ⁴⁴² been obtained against defendants. One of the defendants appealed and secured a reversal of the judgment. Thereupon the other defendant against whom execution had been taken out moved for an order quashing the execution. That motion was granted on the theory that there could not be a several judgment when the action had been joint. Discussing the action of the court below this court says: "We think the court erred in quashing the execution against Carmen. The judgment against her was unaffected by the appeal of her codefendant and the subsequent proceedings thereon." In *Butler v. Ashworth*, 110 Cal. 614, it is said: "If one be injured by a tortious act, he is entitled to compensation for the injury suffered, and, if several persons are guilty in common of the tort, the injured one has his right of action for damages against each and all of the joint tort feasons, and may at his election sue them individually or together." In case one of the wrongdoers has become bankrupt or insolvent, the effect as to him would be to limit the liability to the available assets of his estate, which might be merely nominal. His bankruptcy proceeding, however, would not have the effect of discharging the solvent wrongdoers. Nothing short of satisfaction in some form constitutes a bar in a proceeding like the present.

The judgment is reversed and the cause remanded.

Harrison, J., and Garoutte, J., concurred.

TORTS—JOINT AND SEVERAL LIABILITY.—When one has received an actionable injury at the hands of two or more wrongdoers, all are jointly and severally liable to him for the full amount of damages occasioned by the injury: *Wisconsin Cent. R. R. Co. v. Ross*, 142 Ill. 9, 34 Am. St. Rep. 49. And a judgment against one of several wrongdoers unsatisfied is not a bar to the maintenance of an action against the others: *Russell v. McCall*, 141 N. Y. 437, 38 Am. St. Rep. 807. Compare *Petticolas v. Richmond*, 95 Va. 456, 64 Am. St. Rep. 811.

DENNIS v. FIRST NATIONAL BANK OF SEATTLE

[127 California, 453.]

ATTACHMENT AGAINST NATIONAL BANKS.—No attachment can issue from a state court against a national bank, and all of the attachment laws of the several states must be read as if they contained a proviso in express terms that they were not to apply to suits against national banks.

ATTACHMENT—NATIONAL BANKS—POWERS OF CONGRESS.—Congress has power to protect national banks and to regulate their trade and intercourse with others by granting them special immunities, and protecting them against attachment and other proceedings in state courts, by which their efficiency may be impaired.

Dillon & Dunning, for the appellant.

Mulford & Pollard, for the respondent.

⁴⁵⁴ COOPER, C. Appeal from order dissolving attachment. The complaint shows the defendant to be a corporation organized under the laws of the United States as a national bank. After the filing of the complaint and an affidavit on behalf of the plaintiff, a writ of attachment was issued and placed in the hands of the sheriff. Defendant made a motion, upon proper notice, for an order dissolving the attachment, upon the ground, among others, that the superior court was without jurisdiction to issue said writ and that the same was improperly issued.

By the amendment of March 3, 1873 (U. S. Rev. Stats., sec. 5242), to section 57 of the national banking act of June 3, 1864, an attachment cannot issue against a national bank before judgment. ⁴⁵⁵ The amending act reads: "That section 57 be amended by adding thereto the following: 'And provided further that no attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding or municipal court.' "

The words used are plain and mandatory. The supreme court of the United States, in construing the statute in *Pacific Nat. Bank v. Mixter*, 124 U. S. 726, speaking through the chief justice, after reviewing all the statutes bearing upon the subject, said: "That no attachment should issue from state courts against national banks, and all the attachment laws of the states must be read as if they contained a proviso in express terms that they were not to apply to suits against national banks."

This case has since been followed and the same construction placed upon the statute by the state and federal courts without a single exception that has been brought to our knowledge: *Garner v. Second Nat. Bank of Providence*, 66 Fed. Rep. 369; *Safford v. National Bank of Plattsburg*, 61 Vt. 373; *First Nat. Bank of Kasson v. La Due*, 39 Minn. 415; *Bank of Montreal v. Fidelity Nat. Bank*, 112 N. Y. 667; *Rosenheim Real Estate Co. v. Southern Nat. Bank* (Tenn. Ch., Nov. 20, 1897), 46 S. W. Rep. 1026; *Freeman Mfg. Co. v. National Bank of the Republic*, 160 Mass. 398.

The section is not unconstitutional. It is not claimed that the act of Congress authorizing national banks is unconstitutional. If Congress has power to authorize the creation of the national banks, it has power to protect them and to regulate their trade and intercourse with others by granting them special immunities, and protecting them against suits or proceedings in state courts by which their efficiency would be impaired: *Chesapeake Bank v. First Nat. Bank of Baltimore*, 40 Md. 269, 17 Am. Rep. 601; *Freeman Mfg. Co. v. National Bank of the Republic*, 160 Mass. 398.

The process of attachment under our code is a creature of the statute. It has always been held that the legislature might provide, not only the cases in which an attachment might issue, but the classes of property upon which it might be levied. It has accordingly been held that money in the custody of the law is not the subject of attachment. This court has held that an act providing for the dissolution of attachments levied within two ⁴⁵⁶ months before the filing of a petition in bankruptcy is constitutional: *Baum v. Raphael*, 57 Cal. 361.

The legislature of this state has provided, among other things, that courthouses, certain public buildings, and many classes of property shall be exempt from execution. It might provide that no attachment should issue in any case. We see no reason why the legislature of the nation has not the power to provide that no attachment shall issue against any bank created and existing under its authority.

The order should be affirmed.

Haynes, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the order is affirmed.

Henshaw, J., Temple, J., McFarland, J.

ATTACHMENT AGAINST NATIONAL BANKS.—The act of Congress providing that no attachment, injunction, or execution shall issue against a national bank before final judgment, in any action in a state court, is constitutional: *Chesapeake Bank v. First Nat. Bank*, 40 Md. 269, 17 Am. Rep. 601; yet it has been held that an attachment may issue from a state court against a nonresident national bank: *Robinson v. National Bank*, 81 N. Y. 385, 37 Am. Rep. 508; *Holmes v. National Bank*, 18 S. C. 81, 44 Am. Rep. 558.

BENSON v. BUNTING.

[127 California, 532.]

REDEMPTION—CHANGE IN THE LAW.—The statutory time within which redemption from mortgage foreclosures must be effected is fixed by the statute in force at the time that the mortgage is executed, and not by one subsequently enacted.

MORTGAGES—FORECLOSURE—REDEMPTION—FRAUD. If the purchaser at a mortgage foreclosure sale employs the mortgagor's attorney to make the bid for him, and through such attorney misrepresents to the mortgagor that he has one year in which to redeem, and he, relying thereon, neglects to redeem within the statutory period of six months, but tenders full redemption within one year, a refusal to accept such tender operates as a fraud upon him, and entitles him to equitable relief, no matter whether such misrepresentations were fraudulently or honestly made. In such case the purchaser is estopped to insist upon the statutory period for redemption, although the assurances were not in writing, and were made without consideration.

EQUITY JURISDICTION.—MISTAKE IN LAW is not beyond the reach of equity, and if all parties understood the law alike, all making the same mistake, which operated to deprive one of the parties of a valuable right, and to give the other a material advantage not contemplated by either, a court of equity may adjust their property rights as though the law relating thereto was, in fact, as the parties supposed it to be, if that becomes necessary in order to do justice between them.

APPELLATE PRACTICE—SERVICE UPON FICTITIOUS DEFENDANTS.—An appeal need not be dismissed for failure of the appellant to serve notice of appeal upon fictitious defendants, not served with summons, and who made no appearance in the court below.

B. B. Haskell and W. B. Sharp, for the appellants.

E. C. Harrison, for the respondent.

HAYNES, C. In 1892 Margaret Reese and Mary E. Dever, two of the plaintiffs in the action, executed to one William M. Iburg a mortgage upon the real estate described in the complaint herein, to secure the payment of money. In a proceeding to foreclose said mortgage, a decree for the sale of the

mortgaged premises was entered on April 13, 1897, and on June 1, 1897, ⁵³⁴ the mortgaged premises were sold to defendant Bunting for the sum of nine hundred and fifty dollars, and on February 1, 1898, the commissioner who made the sale conveyed said premises to the purchaser. In January, 1898, the defendants in the foreclosure case offered to redeem said premises from said sale, and tendered to Bunting the full amount required to effect such redemption, which was refused, and this action is prosecuted to obtain a decree permitting them to redeem, notwithstanding the statutory period for redemption had expired before their offer to redeem was made. The other defendants were fictitious persons who were not served, and Bunting will be regarded as the sole defendant.

The complaint contains two counts or causes of action; the first alleging that plaintiffs were induced, through the fraud of the defendant, to believe that they had, under the statute, twelve months within which to redeem the premises sold, and the second count was based upon the alleged mutual mistake of all the parties, all believing and agreeing that the mortgagors had twelve months within which to redeem, when in fact the law gave them but six months. The defendant demurred to each count upon the ground that the facts stated did not constitute a cause of action. The demurrers were sustained and judgment of dismissal entered, and plaintiffs appeal.

In 1892, when the mortgage was executed, the statute provided that redemption might be made at any time "within six months after the sale": Code Civ. Proc., sec. 702. This section was amended February 26, 1897, by extending the time for redemption to "twelve months," the amendment to take immediate effect; and in the second count it was alleged, in substance, that all the parties understood and agreed that said amendment which was passed and took effect before the decree was entered in the foreclosure case, controlled, and that under it the time for redemption was extended to twelve months. It is conceded by plaintiffs that the statutory time within which redemption must be effected is fixed by the statute in force at the time the mortgage was executed, and not by one subsequently enacted, and that, under the statute, they should have redeemed within six months from the date of the sale.

⁵³⁵ It is alleged in the first cause of action that at the time of the sale, and repeatedly thereafter, until the last of January, 1898, the defendant represented to the plaintiffs that they had

a full year in which to redeem; that prior to the sale the plaintiffs employed certain attorneys, who continued in their employment until the 29th of March, 1898; that on June 1, 1897 (the day of the foreclosure sale), Bunting employed the same attorneys, ostensibly to act for him in bidding for said property at said sale, but in reality to deceive the plaintiffs and lead them to believe that they had a full year in which to redeem said property, and that they, as well as defendant Bunting, then, and repeatedly afterward, until January 31, 1898, knowing that plaintiffs reposed full confidence in them, and intending to cheat and defraud the plaintiffs in the interest and for the benefit of defendant Bunting, informed them that they had a full year in which to redeem, that these representations were false, and were so made in a manner not warranted by the information of the defendant or of his said attorneys, and were so made with intent to deceive the plaintiffs. .

Respondent insists that this mode of alleging actual fraud applies only to cases of contract, as specified in section 1572 of the Civil Code, and also insists that the allegations of fraud are not sufficiently specific; that the alleged misrepresentation was of a matter of law and not of fact, and after all was a mere matter of opinion, that there was no confidential or fiduciary relation between the plaintiff and defendant, and that plaintiff had no right to rely upon his representations.

I think, however, that the allegations touching defendant's employment of plaintiffs' attorneys, and the allegations touching their intention in making the alleged representations, are sufficient as tested by general demurrer; but if it be conceded that the representations made by the defendant and by the attorneys, who it would seem from the allegations were acting for both parties, were honestly made, and without any intention to deceive or mislead, enough is alleged to entitle plaintiffs to relief; that if upon the trial the court should find that these representations were honestly made, and without any intention to mislead or deceive the plaintiffs, and that, relying upon the correctness of the representations so made, they failed to redeem ⁵⁸⁶ within six months, as they would otherwise have done, and within the twelve months, which they were assured they had under the law, they offered to redeem and tendered the redemption money due at the date of the tender, they would be entitled to relief. It is alleged that if they had not been informed and believed that they had a year in which to redeem their property, they would have redeemed it within the six

months; that the property was of the value of five thousand dollars, and was sold to defendant for nine hundred and fifty dollars. If, therefore, it be conceded that the representations touching the time for redemption were made with an honest, though erroneous, belief that they were true, no injustice would be done the defendant in permitting the plaintiffs now to redeem. Upon that supposition the defendant made his bid upon the basis of a twelve month period for redemption, and he should have accepted their offer to redeem made within that time, and his refusal to do so operated as a fraud upon them, and entitled them to relief in equity.

Upon this subject the supreme court of the United States said: "Defendant relies mainly upon the fact that the statutory period of redemption was allowed to expire before this bill was filed, but the court below found in this connection that, before the time had expired to redeem the property, the plaintiff was told by defendant Stephens that he would not be pushed, that the statutory time to redeem would not be insisted upon, and that the plaintiff believed and relied upon such assurance. Under such circumstances, the courts have held with great unanimity that the purchaser is estopped to insist upon the statutory period, notwithstanding the assurances were not in writing and were made without consideration, upon the ground that the debtor was lulled into a false security: *Guinn v. Locke*, 1 Head, 110; *Combs v. Little*, 4 N. J. Eq. 310, 40 Am. Dec. 207; *Griffin v. Coffey*, 9 B. Mon. 452, 50 Am. Dec. 519; *Martin v. Martin*, 16 B. Mon. 8; *Butt v. Butt*, 91 Ind. 305; *Turner v. King*, 2 Ired. Eq. 132, 38 Am. Dec. 679; *Lucas v. Nichols*, 66 Ill. 41; *McMakin v. Schenck*, 98 Ind. 264. In *Southard v. Pope*, 9 B. Mon. 261, 264, it is said that 'a refusal by the purchaser to accept the money and permit the redemption to be made within the time agreed would be a fraud upon the ⁵³⁷ defendant in execution, and authorize an application by him to a court of equity for relief': *Schroder v. Young*, 161 U. S. 334, 344.

2. As to the second count, we think it clearly sufficient to justify a judgment permitting the plaintiff to redeem. Section 1578 of the Civil Code defines a mistake of law to be: "1. A misapprehension of the law by all parties, all supposing they knew and understood it, and all making substantially the same mistake as to the law."

The mistake, as to which statute governed the right of redemption in that particular case, was one which might be

readily made. The redemptioners might well rely upon the statements of the defendant and of counsel, and have adopted their views as to the time given by law for redemption. The mistake was one which related to rights which the redemptioners had in the property sold under the decree of foreclosure, and was solely in regard to the time within which an undisputed and well-understood legal right might be exercised. All understood the law alike, all making the same mistake; and where, as in this case, the mistake operates to deprive one of the parties of a valuable right, and to give the other a material advantage not contemplated by either, a court of equity will adjust their property rights as though the law relating thereto was, in fact, as the parties supposed it to be, if that becomes necessary to do justice between them. In *Hunt v. Rousmanier*, 8 Wheat. 174, 215, Chief Justice Marshall said: "Although we do not find the naked principle that relief may be granted on account of ignorance of law asserted in the books, we find no case in which it has been decided that a plain and acknowledged mistake in law is beyond the reach of equity."

In view of our conclusions hereinbefore stated, it is not necessary to consider the question of inadequacy of the price paid for the property by the defendant, further than to say that the inadequacy here alleged, conceding that it was not so gross as to constitute a ground for vacating the sale where the statute gives a right of redemption, is a proper allegation in a bill in equity to redeem, as it shows that the equity involved is valuable and important.

Respondent contends that the appeal should be dismissed ⁶⁸⁸ upon the ground that the two fictitious defendants named in the complaint should have been served with the notice of appeal. It is sufficient to say that no service of process was made upon them, or upon any person intended to be represented by these names, nor was there any appearance by them, or by any person other than defendant Bunting. These fictitious persons could not be affected by any judgment this court or the court below might render.

I advise that the judgment appealed from be reversed, with directions to the court below to overrule the demurrer to each cause of action.

Chipman, C., and Britt, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is reversed, with directions to the court below to overrule the demurrer to each cause of action.

Harrison, J., Garoutte, J., Van Dyke, J.

THE TIME FOR REDEMPTION from a sale under execution may be prolonged by a verbal agreement of the parties: *Griffin v. Coffey*, 9 B. Mon. 452, 50 Am. Dec. 519. See, also, *Combs v. Little*, 4 N. J. Eq. 310, 40 Am. Dec. 207, and the note thereto, discussing agreements to purchase or hold land purchased on execution for a defendant, and the effect thereon of fraud.

A MISTAKE OF LAW may be relieved against in some cases: See the monographic note to *Alabama etc. Ry. Co. v. Jones*, 55 Am. St. Rep. 502-504.

SUNKLER v. McKENZIE.

[127 California, 554.]

JUDGMENTS—RES JUDICATA—APPEALABLE ORDERS. An order denying the right of an insolvent debtor to the proceeds of a crop grown upon land claimed by him as a homestead, and establishing the right of the assignee in insolvency thereto, is appealable, and, after the time for an appeal therefrom has elapsed, becomes res judicata and a bar to an action by the homestead claimant to recover the value of the crop against such assignee in his individual capacity.

JUDGMENTS—RES JUDICATA.—The determination of a substantial matter of right upon motion or summary proceeding upon which the parties interested have a right to be heard and necessarily decided by the court as the basis for the order finally entered, is res judicata whenever the same subject matter is sought to be litigated in an independent action between the same parties.

W. H. Barrows, for the appellant.

C. J. Beerstecher, for the respondent.

554 **CHIPMAN, C.** Action to recover the value of a certain crop of grapes grown upon land claimed by plaintiff to be a homestead. On June 19, 1895, plaintiff recorded his declaration of homestead upon certain farm land in Napa county; June 28th he was adjudged insolvent upon his own petition; August 19th he petitioned to have a homestead set apart to him in the insolvency proceedings; on September 23d the petition was heard and the court found that the premises were of greater value than five thousand dollars, and that Sunkler was entitled to have a **555** homestead set apart to him of value no greater than five thousand dollars; and three appraisers were

appointed to appraise and admeasure the premises; that they made report November 26th, setting apart certain two hundred acres, including the dwelling, valued by them at five thousand dollars, but "the crop had been removed and did not enter as a factor in such valuation"; and on December 30th the court entered its decree confirming said report, "awarding and setting apart to said insolvent, as a homestead, the land and premises thus admeasured"; that on June 28th aforesaid "a crop of grapes had just formed and commenced to grow on the grape vines then growing on said homestead property"; that they thereafter grew and matured about September 28th; that on September 13th, and "while said proceedings were pending to set aside the homestead above recited, an order was made by the court, in the matter of said insolvency," directing the assignee therein (defendant in this action) to sell all the grapes growing on said land, pursuant to which he sold the crop, realizing six hundred dollars for the grapes grown on the portion of the land awarded Sunkler as a homestead. The court made the following finding:

"That on the eleventh day of January, 1896, plaintiff, said insolvent, filed in said court and matter his petition praying that said assignee be directed to pay over to petitioner said sum of six hundred dollars, in which petition the plaintiff submitted to the court all the matters and things in his complaint herein set out, and sought an adjudication of the rights and all thereof in this action asserted by him. An answer was filed therein by the assignee objecting to the making of such an order, and said matter was duly set for hearing, the respective counsel appearing therein, whereupon testimony, oral and documentary, was offered by the respective parties and the merits of said cause were fully argued and considered, and the cause submitted on briefs to be filed. Thereafter, and on March 7, 1896, the court made and rendered its decision therein, finding upon all the issues framed by such petition and answer thereto, and adjudging that petitioner was not entitled to recover said sum or any part thereof. Judgment was thereupon entered accordingly, and thereafter and on the fifteenth day of April, 1896, written ⁵⁵⁶ notice of such decision was duly served by defendant's attorney on the attorney for plaintiff, and no exception to or appeal from said decision or judgment was ever taken, nor has the same been sought to be modified or set aside, but still stands as made and entered in said matter."

After the insolvent had failed to recover upon his petition in the insolvency proceeding he commenced this independent action in which judgment went against him, and hence this appeal from the order denying his motion for a new trial and from the judgment.

Section 64 of the Insolvency Act of 1895 provides that: "It shall be the duty of the court having jurisdiction of the proceedings to exempt and set apart, for the use and benefit of said insolvent, such real and personal property as is exempt from execution," and the section provides that there shall be notice of the hearing of the application. Section 71 of the act provides that an appeal may be taken to the supreme court: "5. From an order against or in favor of setting apart homestead or other property claimed as exempt from execution." Appellant claims that the judgment entered denying his petition of January 11, 1896, and adjudging that the funds in the assignee's hands belonged to the creditors of the insolvent, was merely an interlocutory order made upon motion, and that he was not precluded thereby from bringing a separate action to recover the property. Mr. Freeman says: "The tendency of the recent adjudications is to inquire whether an issue or question has been in fact presented for decision and necessarily decided, and, if so, to treat it as *res judicata*, though the decision is the determination of a motion or summary proceeding, and not an independent action. This is especially true when the decision did not involve a mere question of the proper form or time of proceeding, but was the determination of a substantial matter of right, upon which the parties interested had a right to be heard upon issues of law or fact or both, and these issues, or some of them, were necessarily decided by the court as the basis of the order which it finally entered granting or denying the relief sought": Freeman on Judgments, sec. 326, and cases cited.

Appellant concedes that the court had the power to give or ⁵⁵⁷ withhold the relief sought at its pleasure, but he contends that the order was not final or appealable, and therefore was not a bar to this action. Some of the cases place importance upon the fact that the order is appealable where it is pleaded in bar. If the statute did not make the order in the present case one from which an appeal may be taken, a different question might arise, upon which we express no opinion. But we think the order here was appealable. The relief asked by the insol-

vent in his petition rested on the claim that the property was exempt from execution; it could have no other foundation, and the court must have so regarded the issues, for it found that the money was not exempt. The subject matter of the petition was identical with that in controversy here; the parties were the same and in the same right, and the petition was presented to a court of competent jurisdiction. The fact that defendant here was not sued in his capacity as assignee can make no difference. He held the money in that capacity and defended in that capacity, and the identity of the two actions cannot be destroyed by making him a defendant in the present action in his individual capacity. The identities demanded by the law to make the matter *res judicata* were fully supplied: Freeman on Judgments, sec. 252. It is familiar law, as well as manifest justice, that a man should not be vexed twice with the same litigation. This rule is not without its exceptions. But when, as here, a question has once been fully litigated and every opportunity given to either party to present his case and to have any supposed errors in the lower court corrected by review in the highest court, it would be an abuse of the rights of a litigant to compel him to enter upon a second trial of the same question. In this case the insolvent presented a formal petition in writing, in the proceeding which he himself had instituted; the assignee answered; the cause was tried upon evidence submitted, documentary and oral; the case was argued upon briefs and submitted for decision; the court made full findings and entered judgment thereon, and no steps were taken to renew the motion to set aside or vacate the judgment or appeal therefrom. This judgment, in our opinion, became an adjudication of the matter in controversy and final as to the facts then litigated: See the subject discussed and the cases cited in *Commissioners etc. v. McIntosh*, 30 Kan. 234.

558 It becomes immaterial whether the court erred in finding that plaintiff did not reside upon the premises when he filed his declaration of homestead, and it is also immaterial by what right he claimed the proceeds of the grapes as property exempt from execution. Whatever was the basis of his right, the right itself was litigated and the judgment is a bar to the present action.

The judgment and order should be affirmed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Garoutte, J., Harrison, J., Van Dyke, J.

Hearing in Bank denied.

RES JUDICATA.—ORDERS made upon motions, petitions, or rules affecting substantial rights, and from which an appeal lies, are as conclusive upon the issues necessarily decided as are final judgments: *Burner v. Hevener*, 34 W. Va. 774, 26 Am. St. Rep. 948. For numerous applications of the doctrine of res judicata, see the notes to *Hawks v. Evans*, 14 Am. St. Rep. 250-252; *Gould v. Sternburg*, 15 Am. St. Rep. 142-144.

RES JUDICATA—HOMESTEAD.—If after the foreclosure of a mortgage the defendant files a claim of homestead, and a verdict is rendered against such claim and the property adjudged subject to execution, the defendant is concluded from asserting any further homestead claim: *Oonahan v. Johnston*, 108 Ga. 235, 75 Am. St. Rep. 86.

DE JARNATT v. MARQUEZ.

[127 California, 558.]

NEGOTIABLE INSTRUMENTS.—ATTORNEYS' FEES, provided for in a note in case of suit thereon, are in the nature of special damage.

JUSTICE'S COURT—JURISDICTION—VOID JUDGMENT. A justice's court is without jurisdiction of an action upon a note stipulating for attorneys' fees in event of suit when the amount of the principal and attorneys' fees demanded exceed the statutory jurisdictional amount, and the judgment rendered in such action is void.

JURISDICTION—APPEAL FROM JUSTICE'S JUDGMENT. If the superior court, upon appeal from a void justice's judgment, has tried the case and rendered judgment exceeding in amount the statutory limit in the justice's court, the supreme court has jurisdiction of an appeal from that judgment, and such appeal cannot be dismissed for want of jurisdiction.

APPELLATE PRACTICE—DISMISSAL OF APPEAL.—The fact that the sureties in an undertaking upon appeal have failed to justify is not ground for dismissing the appeal, nor is the fact that one of the attorneys of appellant is a surety upon such undertaking ground for such dismissal.

R. Dunnigan and H. L. Dunnigan, for the appellant.

H. J. and W. Crawford, for the respondent.

559 HENSHAW, J. This is an application to dismiss defendant's appeal. Plaintiff commenced an action in the jus-

tice's court to recover upon a promissory note made by defendant in the sum of two hundred and fifty dollars. The instrument provided for the payment of attorneys' fees in the event of suit. In his complaint in the justice's court plaintiff alleged that the sum of one hundred dollars was a reasonable attorney's fee. He asked judgment for the face of the note, with interest, and attorney's fee in the sum of one hundred dollars. Defendant joined issue in the justice's court, and, after trial, appealed to the superior court from the judgment given against him. The appeal was upon questions both of law and fact. After trial de novo in the superior court, judgment was again given for plaintiff for the amount of the note with interest, and for attorneys' fees fixed in the sum of one hundred dollars. From the judgment of the superior court defendant took the appeal to this court which is here sought to be dismissed.

Attorneys' fees under a contract such as this are in the nature of special damage: *Prescott v. Grady*, 91 Cal. 519; *Clemens v. Luce*, 101 Cal. 432. Plaintiff's demand, therefore, in his action in the justice's court was for two hundred and fifty dollars, the principal sum of the promissory note, and the one hundred dollars pleaded by way of special damage as a reasonable attorney's fee. The justice's court was therefore without jurisdiction and its judgment void: Code Civ. Proc., sec. 112, subd. 1. Whether or not, upon a showing of these facts, the superior ~~560~~ court should have declared the judgment of the justice's court void, still as it tried the case and rendered a judgment against defendant for over three hundred dollars, he has the right of appeal to this court from that judgment, even though it be void.

The fact that the sureties did not justify upon the three hundred dollar appeal bond is not a ground for dismissal of the appeal: *Hill v. Finnigan*, 54 Cal. 311; *Tompkins v. Montgomery*, 116 Cal. 120. Nor is the further fact that one of the attorneys of appellant became a surety upon the undertaking on appeal in violation of a rule of the superior court a ground of dismissal. It is a matter cognizable before that court, to be dealt with as it shall be advised.

The motion to dismiss is denied.

McFarland, J., Temple, J., Van Dyke, J., Harrison, J., and Garoutte, J., concurred.

NEGOTIABLE INSTRUMENTS.—ATTORNEYS' FEES stipulated for in a note in case of suit thereon are not in the nature of additional interest, but simply a provision against possible loss or damage of a certain and definite character: See the monographic note to *Kittermaster v. Brossard*, 55 Am. St. Rep. 441.

JURISDICTION AS DETERMINED BY AMOUNT.—The aggregate sum demanded is the test of jurisdiction: *Martin v. Goode*, 111 N. C. 288, 32 Am. St. Rep. 799. The amount actually due and for which judgment is demanded is the proper test in determining the limit of jurisdiction. A court having jurisdiction of actions only where the amount in controversy does not exceed three hundred dollars has no jurisdiction of an action on a note for three hundred dollars and interest: *Wilson v. Sparkman*, 17 Fla. 871, 35 Am. Rep. 110.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

McMILLAN v. HARRIS.

[110 Georgia, 72.]

AUCTIONS—PUFFERS.—If a person having such control of an auction sale that he can, of his own volition, release a bidder from all responsibility for his bid, employs a person upon that kind of an understanding to bid at the sale without disclosing for whom he is bidding, for the purpose of preventing the property from selling at a sacrifice, or for the purpose of making it bring more than its actual value, the bidding under such employment is such a fraud upon the real bidders that the sale may be declared void at their instance. The only way for such person to prevent a sacrifice of the property sold is to fix a minimum price of which public notice is given, or make public the fact that he, either by himself or others, will be a bidder at the sale.

AUCTIONS—PUFFERS.—The mere fact that a person is interested in the property to be sold at auction, or in the proceeds of such sale, does not preclude him from either bidding himself or from procuring another to bid openly or secretly, in his behalf, without regard to what the agreement may be with such bidder, if the one employing such bidder has not himself such control of the sale that he could absolutely release the bidder from all responsibility growing out of his having participated in the sale in that capacity.

AUCTIONS—JUDICIAL SALES—PUFFING.—A person who is entitled to the proceeds of a judicial sale of land by an executor may engage a third person to bid the property up to a specified price, with an agreement that if it is sold to such bidder, the person who thus employs him will take it off his hands.

Denmark, Adams & Freeman, for the plaintiff in error.

R. R. Richards, G. W. Owens, and A. C. Wright, for the defendant in error.

⁷³ COBB, J. Stoyell C. Parsons and Elizabeth Catherine Mass, by her father as next friend and guardian, brought suit in the superior court of Chatham county against the executors of the last will and testament of Sarah M. Parsons, and others, alleging in their petition that they were joint owners of certain described realty in the city of Savannah, and praying that a certain deed alleged to be a cloud upon the title of petitioners might be delivered up to be canceled, and that the executors take charge of the realty and dispose of the same for the benefit of petitioners. When the case came on for a hearing a decree was entered, providing that the trust deed referred to be set aside and canceled, and that the executors "take charge of and dispose of the property set out in said petition, in accordance with the terms of compromise as agreed on," and to this end advertise the property in a designated way for sale at public outcry before the door of the courthouse of Chatham county, during the legal hours of sale, to the highest bidder, and report the sale to the court for confirmation. The sale was had in the manner prescribed in the decree, and on the day fixed in the advertisement the property was sold in several parcels and knocked down to different purchasers. The executors reported the sale to the court, when it appeared that one of the parcels had been knocked down to T. H. McMillan, the plaintiff in error, for the sum of fourteen thousand dollars. In answer to the rule nisi calling upon him to show cause why the sale should not be confirmed, McMillan set up that the price at which the property was knocked down to him was the result of "puffing" or "by-bidding" at the sale, done at the instance of parties owning an interest in the property, and in fraud of his rights as purchaser; that the property was run up by the owners thereof, without his knowledge, by bids that were not real or genuine, but made for the purpose of puffing the property, and that such conduct rendered the sale illegal and released him from the obligation to pay for the property. After hearing the evidence the judge held that sufficient cause had not been shown to authorize him to refuse to confirm the sale, and an order was passed confirming the sale and directing ⁷⁴ McMillan to pay the amount of his bid into the hands of the executors. To this ruling McMillan excepted, assigning as error that the decision of the judge was contrary to law and the evidence; that the evidence required a finding that the sale was puffed, and was therefore illegal.

It appears from the evidence that the petitioners in the original proceeding, Miss Mass and Dr. Parsons, were, under the will of Sarah M. Parsons, entitled each to a one-half interest in the property involved in the present case. Mr. Owens was an attorney at law representing Miss Mass. Mr. Seabrook was an attorney at law representing Dr. Parsons. Mr. Owens was at the sale and made several bids on the property, one of these bids being immediately before the bid of McMillan at which the property was knocked down to him. Mr. Owens was not bidding in his own interest. He was bidding for his client by authority given him to bid such an amount as in his discretion would be necessary to prevent the property from being sold at a sacrifice. It also appears that Mr. Owens and Mr. Seabrook, representing their respective clients, had agreed that the property should not be sold for less than thirteen thousand dollars, and that in pursuance of this agreement Mr. Owens became a bidder at the sale; and it is to be inferred from the testimony that, if the property had been knocked down to him, the purchasers would have been neither himself nor Mr. Seabrook, but their respective clients. It also appears that out of the proceeds of the sale different items of costs and expenses connected with the litigation were to be paid by the executors; the amount of such items which were due and unpaid at the date of the hearing of the petition brought to confirm the sale being more than two hundred and fifty dollars. The auctioneer who conducted the sale was one of the executors, and it appeared that neither in his capacity as auctioneer nor as executor did he have any connection whatever with the arrangement made between Mr. Owens and Mr. Seabrook, and there was no reason whatever why he could not, if the property had been knocked down to Mr. Owens, have treated him as the purchaser and invoked the aid of the court to that end. It appeared distinctly from the testimony that if there was any puffing or by-bidding, neither the auctioneer nor the executors had ⁷⁵ any connection with the same, and that it was done without their consent, knowledge, or authority. The controlling question to be determined is, whether the conduct of Mr. Owens, in entering into the arrangement with Mr. Seabrook to bid on the property in behalf of their respective clients so as to prevent its sacrifice, and bidding at the sale for that purpose without the expectation of becoming a purchaser himself, was of such a character as to authorize the court to declare that McMillan was misled, and that for that reason the sale was void and should be set

aside. To properly determine this it is necessary to investigate the law of sales at auction and determine who is a puffer at an auction and what conduct would amount to puffing so as to invalidate the sale.

There is no decision of this court bearing directly upon this question. The presence at auction sales of persons who bid for the purpose of inflating the value of the property in behalf of those interested in the sale is a matter at the present time of very common occurrence, and has been from the time that auction sales were first known. This practice has brought about many controversies which resulted in numerous cases, and the effect of such conduct has been discussed by many judges and text-writers. A person of the character referred to is usually denominated a puffer, but he is sometimes referred to as a by-bidder, capper, decoy duck, white bonnet, or sham bidder. The first time that this question seems to have come before the English courts, so far as the reported cases are concerned, was in the case of *Walker v. Nightingale*, 3 Brown P. C. 263, which was decided in 1726. It was held by the house of lords in that case that a puffer could not recover compensation for his services, since they were contrary to good faith. The next case in point of time was *Bexwell v. Christie*, 1 Cowp. 395, which was decided by the court of king's bench in 1776. This was a decision by Lord Mansfield, and as it was rendered prior to the date named in our adopting statute it is controlling authority in this state: *Thornton v. Lane*, 11 Ga. 500. For this reason it is necessary to examine that case with some care. An action was brought against an auctioneer for selling a horse at the highest price bid for him, contrary to the owner's express direction not to allow him to go under a larger sum named; and it was held that such an action would not lie, but that it would have been otherwise if the owner had directed the auctioneer to put the horse up at a particular price and not lower. The opinion of Lord Mansfield in the case was as follows:

"The matter in question is in itself of small value; but in respect of the principles by which it must be governed, it is a question of great importance. Since the trial I have mooted the point with many who are not lawyers, upon the morality and rectitude of the transaction. The question is whether a bidding by the owner of goods at a sale under these conditions, namely, 'that the highest bidder shall be the purchaser, and if a dispute arise, to be decided by a majority of the persons present,' is a bidding within the meaning of such conditions of sale.

"There is no express undertaking on the part of the defendant, nor is it, as has been ingeniously said, a direction that there should be no bidding under fifteen pounds, which might be fair. But the direction given to the defendant is, 'not to let the horse go under fifteen pounds,' which implies there might be a bidding under that sum. The question then is whether the owner can privately employ another person to bid for him. The basis of all dealings ought to be good faith; so, more especially in these transactions, where the public are brought together upon a confidence that the articles set up to sale will be disposed of to the highest real bidder. That could never be the case, if the owner might secretly and privately enhance the price, by a person employed for that purpose; yet tricks and practices of this kind daily increase, and grow so frequent that good men give in to the ways of the bad and dishonest in their own defense. But such a practice was never openly avowed. An owner of goods set up to sale at an auction never yet bid in the room for himself. If such a practice were allowed, no one would bid. It is a fraud upon the sale and upon the public. The disallowing it is no hardship upon the owner. For if he is unwilling his goods should go at an under price, he may order them to be set up at his own price, and not lower. Such a direction would be fair. Or he might do as was done by Lord Ashburnham, who sold a large estate by auction; he had it inserted in the conditions of '77 sale that he himself might bid once in the course of the sale, and he bid at once fifteen thousand or twenty thousand pounds. Such a condition is fair, because the public are then apprised and know upon what terms they bid. In Holland it is the practice to bid downward.

"The question then is, Is such a bidding fair? If not, it is no argument to say it is a frequent custom. Gaming, stock jobbing, and swindling are frequent. But the law forbids them all. Suppose there was an agreement to abate so much, which is the case where goods are sold by one person in the trade to another; they abate sometimes ten or fifteen per cent. Such an agreement between the owner and a bidder, at a sale by auction, would be a gross fraud. What is the nature of a sale by auction? It is that the goods shall go to the highest real bidder. But there would be an end of that, if the owner might privately bid upon his own goods. There is no contract with the auctioneer. He is only an agent between the buyer and seller. He may fairly bid for a third person who employs him, but not for the owner.

"In this case there is another fraud upon the public. For by the catalogue the goods are described to be 'the goods of a gentleman deceased, and sold by order of the executor.' Upon this representation many people would attend to bid on a supposition that the goods were necessarily to be sold at all events, whether valuable or not valuable; whereas they might have their suspicions if they were the property of persons living. Horses, or any other species of property, belonging to persons that are dead are not so likely to be faulty as those which are parted with by persons in their lifetime. We all remember the sale of a gentleman's wines, where vast quantities had been sent in belonging to other persons; and all sold at a very high price under an idea that they were his. The consequence was, most of the buyers were taken in.

"Therefore, upon full consideration, I am of opinion that a bidding by the owner in the manner contended for, and agreeable to the directions given in this case, would have been a fraud upon the sale; and, consequently, that this action against the defendant as auctioneer cannot be maintained."

In *Howard v. Castle*, 6 Term Rep. 642, the decision of Lord Mansfield ⁷⁸ in *Bexwell v. Christie*, 1 Cowp. 395, was followed by Lord Kenyon. In *Wheeler v. Collier*, 1 Moody & M. 123, 22 Eng. C. L. 487, a sale at which there were two puffers was held to be void, and Lord Tenterden stated that the inclination of his mind was that the employment of only one puffer would avoid a sale. In *Crowder v. Austin*, 3 Bing. 368, 11 Eng. C. L. 184, it appeared that the vendor of a horse stationed his servant to join in the bidding at a public auction, and the servant bid up to twenty-three pounds after a bona fide bidder had bid twelve pounds. It was held that the sale could not be enforced against a subsequent bidder. In *Green v. Baverstock*, 14 Com. B., N. S., 202, it was held that upon a sale of goods by auction, where the highest bidder is to be the purchaser, the secret employment of a puffer on behalf of the vendor is a fraudulent act and vitiates the sale. In that case Byles, J., said: "The sale is vitiated by the fraud and void unless the vendee, with knowledge of the fact, has acted upon it so as to deprive himself of the right to complain. This has been the law of England, and indeed of the whole of Europe, for a very long time indeed. It was a law of universal application even before the Christian era." The decisions of the common-law courts of England have been almost without exception in line with the decision of Lord Mansfield in *Bexwell*

v. Christie, 1 Cowp. 395. The principle at the foundation of this decision was, that for one to offer his property at public outcry to the highest bidder, and then secretly arrange with another to bid on the property in his behalf, with the distinct understanding that he was not to incur any liability on his bid, was a fraud upon the right of those who attended the sale in good faith expecting to come into competition with others like themselves who really desired to purchase the property on the best terms possible. The reason for the rule was the palpable fraud upon bona fide bidders. Strange as it may seem, the English court of chancery did not follow the rule laid down by Lord Mansfield, but, on the contrary, in a number of decisions this rule was criticised, and the fraud incident to puffing at auctions was not only tolerated but approved of by that court. In Conolly v. Parsons, which will be found reported in a note in 3 Ves. Jr. 624, a decision rendered ⁷⁹ in 1797, Lord Chancellor Loughborough found great fault with the conclusion reached by Lord Mansfield and also with the reasoning which led him to that conclusion. According to the rule in that case, unlimited puffing was allowable. While the decision last referred to was not followed by the court of chancery in all of its bearings, that court held, on different occasions, that the mere fact that one puffer was employed to prevent a sacrifice of the property would not be such a fraud as would vitiate the sale when it was otherwise free from infirmity. In Mortimer v. Bell, L. R. 1 Ch. App. Cas. 10, reported in 5 Am. Law Reg., N. S., 310, it was held by Lord Chancellor Cranworth that the rule, said to exist in equity, allowing one puffer to be employed, without notice, to prevent a sale at an undervalue, is abstractly less sound than the rule at law, which declares such employment to be fraudulent, and rests only on the authority of decisions in lower branches of the court: See, also, in this connection, Flint v. Woodin, 9 Hare, 618; Robinson v. Wall, 2 Phill. Ch. 372; Smith v. Clarke, 12 Ves. Jr. 476. The conflict between the rule laid down by the common-law and the chancery courts of England was finally settled by an act of parliament, which provided that "whenever a sale by auction of land would be invalid at law by reason of the employment of a puffer, the same shall be deemed invalid in equity as well as at law."

In the case of Peck v. List, 23 W. Va. 338, 48 Am. Rep. 398, which is one of the leading American cases on the subject, the English decisions above referred to, as well as many others

by the English common-law and chancery courts, are collected and commented on in the opinion of Mr. Justice Green. We have referred to such of those decisions as we deem necessary to the present discussion. The decision of Lord Mansfield must be treated as binding authority in this state, as there are none of our own decisions in conflict with the rule he there lays down. Attention was called in the argument to the fact that the record in the case of *Locke v. Willingham*, 99 Ga. 297, disclosed that certain charges of the trial judge bearing upon the subject under consideration in the present case were under review, and that the effect of the ruling in that case, which was merely a headnote, ⁸⁰ that no error of law was committed, was to approve of the charges made by the trial judge. We have examined the record in that case, and we find that the charges of the judge under review were not only not in conflict with the rule laid down by Lord Mansfield, but seem to have been in accord therewith. The following decisions and authorities will show the rulings of some of the American courts on this subject: 2 Pomeroy's Equity Jurisprudence, sec. 934, pp. 1336, 1337; 3 Am. & Eng. Ency. of Law, 2d ed., 504, 505; Benjamin on Sales, 7th ed., sec. 470 et seq.; 1 Warvelle on Vendors, 254; 1 Story's Equity Jurisprudence, sec. 293; Bispham's Equity, sec. 209; Tiedeman on Sales, sec. 165; Rorer on Judicial Sales, 44; Bateman on Auctions, 131; 1 Wait's Actions and Defenses, 482; Story on Sales, sec. 482; *Veazie v. Williams*, 8 How. 134; *Flannery v. Jones*, 180 Pa. St. 338, 57 Am. St. Rep. 648; *Bowman v. McClenahan*, 20 N. Y. App. Div. 346; 46 N. Y. Supp. 945; *Pennock's Appeal*, 14 Pa. St. 446, 53 Am. Dec. 561; *Hartwell v. Gurney* (R. I., Jan. 21, 1888), 13 Atl. Rep. 113; *Reynolds v. Dechaums*, 24 Tex. 174, 76 Am. Dec. 101; *Davis v. Petway*, 3 Head, 667, 75 Am. Dec. 789; *Miller v. Baynard*, 2 Houst. 559, 83 Am. Dec. 168; *Jenkins v. Hogg*, 2 Const. S. C. 821; *East v. Wood*, 62 Ala. 313; *Woods v. Hall*, 1 Dev. Eq. 415; *National Bank v. Sprague*, 20 N. J. Eq. 159; *Hinde v. Pendleton, Wythe*, 354; *Curtis v. Aspinwall*, 114 Mass. 187, 19 Am. Rep. 332; *Springer v. Kleinsorge*, 83 Mo. 152; *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195; *Staines v. Shore*, 16 Pa. St. 200, 55 Am. Dec. 492.

An examination of the authorities above cited, as well as of many others which might be cited, will show that the conclusions reached by the American courts on this question are far from being uniform. Some have followed the rule laid down by Lord Mansfield; others the rule announced by Lord Lough-

borough; and still others are not in exact accord with either, but are modifications of one or the other. It is not possible to reconcile the American decisions on this subject, and it would not be profitable to undertake to do this, even if it were possible. We may lay it down as a rule without exception that the employment of a puffer at an auction sale is such a fraud as will vitiate the sale. Such being the rule, the question now to be determined is, Who is a puffer? Mr. Justice Green in *Peck v. List*, 23 W. Va. 338, 48 Am. Rep. 398, thus defines a puffer: "A puffer, in the strictest ⁸¹ meaning of the word, is a person who, without having any intention to purchase, is employed by the vendor at an auction to raise the price by fictitious bids, thereby increasing competition among the bidders, while he himself is secured from risk by a secret understanding with the vendor, that he shall not be bound by his bids." This definition will be found to have been approved by several of the text-writers and many of the judges in the authorities and decisions above cited. It is directly in line with the ruling made by Lord Mansfield in *Bexwell v. Christie*, 1 Cowp. 395. In order to constitute one who bids at a sale a puffer, it is not only necessary that he shall be employed by the owner of the property which is being sold, or by some person having an interest therein, but it must appear that the person employing the puffer was so interested in the auction or act of selling that there could be made with him a binding agreement by which the person bidding incurs not the slightest risk of being called on to comply with the terms of any bid that he may make. If he be employed by the owner of the property, and the owner have complete control of the auction and the auctioneer, as was the case in *Bexwell v. Christie*, 1 Cowp. 395, then no one would question that he was a puffer within the meaning of the law, and his employment would amount to a fraud upon the real bidder. If he be employed by a person interested in the property, although not the sole owner, and such person have complete control over the auction, so that he could entirely relieve him from all responsibility for the bid he would make, then a person employed under such circumstances would be a puffer within the principle of the ruling made in *Bexwell v. Christie*, 1 Cowp. 395. The rule is thus stated by Mr. Justice Green in *Peck v. List*, 23 W. Va. 338, 48 Am. Rep. 398, before referred to: "But it is obviously unimportant whether the by-bidder is employed by the owner of the land or by some one having a pecuniary interest in the auction about to be made, and who stands in such

relation to it that he can make good his assurance to the by-bidder, that he shall not be held responsible for his bid if it happen to be the highest bid made. The real essence of the fraud is not that the owner is bidding for the property, but it consists in the fact that a by-bidder pretending to be a bona fide bidder deceives honest bidders, raises the price of the property by fictitious bids increasing ⁸² competition, while he himself has good reason to believe and does believe that he is secure from any risk of being held personally liable for his bids. It is immaterial from whom he derives this assurance of immunity, provided the party giving the assurance expressly or impliedly has the power either legally or practically to make good the assurance. It makes no difference that such puffer or by-bidder was employed to prevent a sacrifice of the property and was directed to bid it to a fixed price only; nor does it make any difference that the property only sold at a reasonable price."

In many of the cases it is said that a person employed by the owner to secretly bid upon the property would be a puffer. In still others it is said that a person so employed by the vendor would be a puffer. In still others it is stated that a person so employed by the seller would be a puffer; and in still others it is declared that a person employed by those who are pecuniarily interested in the property would be a puffer. In dealing with this subject the terms, "owner," "vendor," "seller," and "person pecuniarily interested in the property or its proceeds," are to be given the same meaning, and they all refer to one who, without regard to what may be his peculiar interest in the property, must have absolute control of the auction sale and is at liberty of his own volition to discharge any bidder from liability on account of his bid. If the person conducting the sale can, notwithstanding the agreement of one who has a larger interest in the proceeds of the sale, hold the bidder responsible for the amount of his bid, then a person employed by the person having such larger interest in the proceeds would not be a puffer within the meaning of the law. Bidding by such a person would not be fraudulent, and therefore the sale would not be affected by the employment of such a person. An auctioneer is the agent of the person who directs him to make the sale. The sale is, therefore, controlled by one who directs the auctioneer. When an auction sale is declared by the auctioneer to be without reserve, this is, in effect, a statement that the person who directs the auctioneer to make the sale, no matter what his interest in the property may be, has empowered the auctioneer to sell the

property to the highest bidder, and that the person directing the ⁸³ auctioneer will not himself bid upon the property or employ others to do so in his behalf. Where the auctioneer puts up property without any statement as to the conditions of sale, the bidders have a right to presume that the sale is to be without reserve. The owner, vendor, seller, or person interested in the sale, whatever we may call him, that is, the person who has directed the auctioneer to sell the property and who will be compelled to make good to the bidder the acceptance of a bid by the auctioneer, is not allowed to secretly bid at the sale. He may bid, however, if public notice be given of the fact, so that other bidders may know that they are coming into competition with the person who has control of the sale. The mere fact that a person is pecuniarily interested in property which is being sold at auction does not preclude him from becoming a bidder; and this is true of judicial sales as well as private sales. No matter what interest a person may have in the proceeds of the sale or in the property which is going to be sold at public outcry, either at private auction or judicial sale, his right to become a bidder at the sale is well recognized by numerous decisions of this court as well as of other courts in this country, provided the sale is not under his control: See, in this connection, *Freeman v. Cooper*, 14 Ga. 238; *White v. Crew*, 16 Ga. 416; *Buckner v. Chambliss*, 30 Ga. 652; *Kilgo v. Castleberry*, 38 Ga. 512, 95 Am. Dec. 406; *Kearney v. Taylor*, 15 How. 494; *Richards v. Holmes*, 18 How. 143; *Pewabic Min. Co. v. Mason*, 145 U. S. 349; *Blossom v. Railroad Co.*, 3 Wall. 196; *Smith v. Black*, 115 U. S. 308; *Allen v. Gillette*, 127 U. S. 589; *Baird v. Baird*, 1 Dev. & B. Eq. 524, 31 Am. Dec. 399; *Gulick v. Webb*, 41 Neb. 706, 43 Am. St. Rep. 720; *Phippen v. Stickney*, 3 Met. 384; *Pennsylvania Trans. Co.'s Appeal*, 101 Pa. St. 576; *Thames v. Miller*, 2 Woods, 564; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587.

Such being the right of one who is interested in the property sold or in the proceeds of the sale, who is himself not conducting the sale and who has not such control over the sale as that he can make a binding agreement with a bidder that he will not be held responsible for his bid, it cannot be a fraud for such person to employ one to bid at a sale in his behalf, even though the fact that the bidder is bidding in behalf of one interested in the ⁸⁴ property is not disclosed to the other bidders. The law charges everyone who attends an auction sale, no matter what

its character, whether resulting from a private agreement or from a judgment of a court, that anyone interested in the proceeds of the sale or in the property and who has no absolute control over the sale may become a competitor with any other person at the sale and bid for the property, and such a person is under no obligation to disclose to others his intention to bid; and therefore the employment by such a person of another to bid in his behalf, without disclosing that he is representing the person so interested, could not in any sense be a fraud upon other bidders. It is true that the law prohibits certain persons from acting as agents of such a person. A sheriff cannot become a bidder at his own sale as agent for another: *Harrison v. McHenry*, 9 Ga. 164, 52 Am. Dec. 435; *Coleman v. Maclean*, 101 Ga. 303. Though it has been held that a sheriff acting as auctioneer at an administrator's sale may make one bid for a person interested in the property to be sold, if he discloses the fact that he is bidding for another, and if his authority is limited to making one bid and he have no discretion to do otherwise: *James v. Kelley*, 107 Ga. 446, 73 Am. St. Rep. 135.

The matter may thus be summed up: If a person who has such control of an auction sale that he of his own volition can release a bidder from all responsibility for his bid employs another upon an understanding of that character to bid at the sale without disclosing for whom he is bidding, for the purpose of preventing the property from selling at a sacrifice or for the purpose of making the same bring more than its actual value, the bidding by one or more persons under such employment is such a fraud upon the real bidders that the sale will be declared void at their instance. The only lawful way in which such a person can prevent a sacrifice of the property sold is to fix a minimum price, of which public notice shall be given, or make public the fact that he, either by himself or by others, will be a bidder at the sale. On the other hand, the mere fact that the person is interested in the property to be sold or in the proceeds of the sale will not preclude him from either bidding himself or from procuring another to bid, either openly or secretly, in his behalf, without regard to what the agreement may be with ⁸⁵ such bidder, if the one employing such bidder has not himself such control of the sale that he could absolutely release the bidder from all responsibility growing out of his having participated in the sale in that capacity. Applying the principles above announced to the facts of the present case, Mr. Owens was

in no sense a puffer, and the sale was not for any reason set up by the plaintiff in error invalid.

Judgment affirmed.

All the justices concurring.

AUCTIONS.—THE EMPLOYMENT OF PUFFERS by owners selling at auction with a view to raise the price on bona fide bidders is a fraud upon them, and the sale may be avoided at the option of the purchaser: *Flannery v. Jones*, 180 Pa. St. 838, 57 Am. St. Rep. 648. However, it is competent for a seller at a public sale to fix a minimum price, or to reserve to himself the right to bid, or to employ another to bid for him, though he must give fair notice of that fact: *Miller v. Baynard*, 2 Houst. 559, 83 Am. Dec. 168. See, further, the monographic note to *Thomas v. Kerr*, 96 Am. Dec. 266-268.

HUNTRESS v. ANDERSON.

[110 Georgia, 427.]

HOMESTEADS—CONVEYANCE OF.—A deed executed by the head of the family pending the continuance of the homestead estate and purporting to convey the reversionary interest in the property therein embraced is valid and effective.

Anderson, Felder & Davis and W. O. Mitchell, for the plaintiff.

Horace & Holden, for the defendant.

428 LUMPKIN, P. J. This case was submitted to the trial judge upon an agreed statement of facts, in view of which its determination depended entirely upon the question of law dealt with in the headnote. If the proposition there stated is sound, the decision excepted to was wrong. The homestead under consideration was set apart under the constitution of 1868, which provided, in substance, that no court or ministerial officer should have authority to enforce against exempted property any execution or other process, so long as the homestead estate should continue to exist. A similar provision appears in our present constitution. This court, in view of this constitutional provision, held in *Jolly v. Lofton*, 61 Ga. 154, that, "pending the existence of a homestead, the reversionary interest of the person from whose property it was set apart is not subject to levy and sale." The decision in that case has been frequently followed. In *Stephenson v. Eberhart*, 79 Ga. 119, 120, Hall,

justice, said: "It is needless to enlarge upon the reasons for preventing the interference by creditors with the property upon which a homestead is charged. Among others, it is evident that the power to levy and sell the estate under execution could not be permitted without manifest injustice, both to the owner of the property and to his creditors, as the uncertainty of the duration of that homestead would so depreciate the value of the estate as would lead inevitably to its sacrifice." There is, however, in the constitution of 1868, no restriction whatever upon the right or power of one in whose land a homestead has been set apart to sell his "reversionary interest" in the property. In this respect that constitution differs from the constitution of 1877, which in distinct terms declares that a debtor who has had property exempted under its provisions shall not, after the homestead is set apart, "alienate or encumber the property so exempted, but it may be sold by the debtor and his wife, if any, jointly, with the sanction of the judge of the superior court of ~~the~~ the county where the debtor resides or the land is situated, the proceeds to be reinvested upon the same uses": Civ. Code, sec. 5914. It would seem that at least one purpose of this provision in our present fundamental law was to prevent the head of a family from alienating his "reversionary interest" in the exempted property, in order that the right and privilege of a sale and reinvestment under judicial sanction might be preserved intact; for, manifestly, the same would be lost in a case where the head of a family had sold and conveyed to another that "reversionary interest." But, as above pointed out, there is nothing in the constitution of 1868 indicating such a policy. Why, then, could not a debtor who obtained a homestead under the provisions of that constitution, which did not provide for or contemplate a sale of the homestead property with a view to reinvestment, voluntarily sell, if he chose to do so, his "reversionary interest" in the exempted property? No reason occurs to us why this could not be done; for, on principle, every man has a right to dispose of any interest he may have in property, unless expressly by law restricted in the exercise of this privilege. If, therefore, we are not precluded by some previous decision of this court which is binding as authority, the question in hand should be determined accordingly.

Three decisions of this court were relied on by counsel for the defendant in error to support the proposition that a deed executed by the head of a family pending the continuance of the

homestead estate and purporting to convey the property therein embraced is an absolute nullity, passing nothing to the grantee. The first is that of *Hall v. Matthews*, 68 Ga. 490. In that case Hall, the head of a family, as an individual executed a deed purporting to convey the entire interest in land covered by a homestead. The grantees named in this deed brought against him an action of ejectment. All that this court really decided was, they could not recover possession, for the reason that to eject the head of the family pending the homestead estate would destroy the full enjoyment of the homestead by the beneficiaries thereof. It is true that in the headnote it is stated that the deed "carried no title to the purchaser"; and in the opinion Chief Justice Jackson remarked that the title did not pass out of the ⁴³⁰ head of the family, and that no recovery could be had against him individually. These expressions must, however, be understood in the light of the facts to which they related, and therefore the effect of the decision merely was that the conveyance executed by Hall was ineffectual to pass title to the homestead estate or in any manner interfere with the enjoyment of the same by the family of the grantor. In that case no question was made as to whether the deed would operate to pass Hall's "reversionary interest" in the land, nor did the court undertake to pass upon that point. See, in this connection, what was said as regards this case in *Towns v. Mathews*, 91 Ga. 549.

The next of the three decisions above mentioned is that rendered in *Hart v. Evans*, 80 Ga. 330, wherein it appeared that the head of a family, Evans, and his wife undertook by their joint deed, pending the continuance of the homestead, to convey absolutely a portion of the exempted land, they, however, remaining in possession of the same. Hart, a judgment creditor of Evans, caused the land described in this deed to be levied on, and the wife interposed a claim, which was sustained. The theory of the plaintiff in execution was that the effect of the deed executed by Evans and his wife was to terminate the homestead as to the land sought to be conveyed, thus rendering the same subject to levy and sale. Upon these facts this court held that this theory was erroneous; but, so far as relates to our present question, the decision went no further. In discussing the effect of that deed, Chief Justice Bleckley referred to it as a "nullity." But, as above remarked with reference to the case of *Hall v. Matthews*, 68 Ga. 490, this expression was doubtless intended merely to convey the idea that the deed of Evans and

his wife was a nullity only in so far as its effect upon the homestead estate was concerned; for there was, in *Hart v. Evans*, 80 Ga. 330, no question raised as to the effect this deed might have in passing Evans' "reversionary interest" in the land.

The remaining one of the three decisions relied on by counsel for the defendant in error is that of *Love v. Anderson*, 89 Ga. 612. It was in that case definitely ruled that a deed executed by the head of a family pending the continuance of a homestead set apart under the constitution of 1868 was ineffectual to pass the ⁴³¹ grantor's "reversionary interest" in the exempted property. Accordingly, if the decision last referred to were binding upon us as authority, it would constrain us to affirm the judgment now under review. That decision is not, however, to be treated as authoritative, for the reason that it was rendered by two justices only; and if the views above presented are correct, the ruling in *Love v. Anderson*, 89 Ga. 612, should not be followed. In a later case, that of *Blacker v. Dunlop*, 93 Ga. 819, where the homestead under consideration was one set apart in 1873, the present question was left open, this court declining to decide anything more than that a deed of this character could not be asserted against the homestead right so long as the homestead continued in existence.

The homestead with which we are now dealing was set apart August 31, 1877, which was prior to the ratification of our present constitution. The act of 1876, "to amend the homestead laws of the state of Georgia," approved February 26th of that year (Acts 1876, p. 48), was of force when this homestead was applied for. But the provisions of that act as to sales of homestead property for the purpose of reinvestment were permissive only, and there is nothing in the act restricting the right of the head of a family to dispose of his "reversionary interest" in the property so set apart. In this connection, it may further be observed that the paragraph of the present constitution which is now embraced in section 5920 of the Civil Code obviously has no bearing upon the case in hand. It merely declares that: "Parties who have taken a homestead of realty under the constitution of 1868 shall have the right to sell said homestead and reinvest the same by order of the judge of the superior courts of this state."

Judgment reversed.

All the justices concurring.

HOMESTEAD.—THE CONVEYANCE of a homestead by the husband is a good conveyance of the reversionary interest in the property after the homestead right ceases: See the monographic note to *Alt v. Banholzer*, 12 Am. St. Rep. 684. Compare *McKenzie v. Showa*, 70 Miss. 388, 35 Am. St. Rep. 654.

REESE v. WORSHAM.

[110 Georgia, 449.]

SURETYSHIP—FORTHCOMING BONDS.—If a claimant of personalty levied upon is allowed to retain possession thereof upon giving the officer a bond with surety conditioned "to have the said described personal property forthcoming to answer the final judgment of the court," and the property is subsequently found liable, the principal and surety are liable if they fail to comply with the conditions of such bond, and are not relieved therefrom by afterward delivering the property to the officer upon a regular forthcoming bond given in another case arising upon the levy of a junior execution, and the fact that the plaintiff in the senior execution, after obtaining judgment on the first bond, does not seek to have the proceeds of the property sold under the junior execution applied to the senior execution, or object to the application made of such proceeds, does not afford sufficient reason for discharging such surety on the trial of an appeal of a judgment against his principal and himself on the bond.

H. Polhill, for the plaintiffs in error.

E. P. Johnston and J. R. L. Smith, for the defendant in error.

449 COBB, J. Mrs. Lancaster (now Mrs. Reese) gave to Worsham & Co. a mortgage upon certain personal property. The debt secured by this mortgage not having been paid when due, a foreclosure was had, on which execution was issued and levied upon certain of the property embraced in the mortgage. Mrs. Reese, as guardian, interposed a claim to the property levied ⁴⁵⁰ on, and executed a bond with J. W. Hart as security, conditioned "to have the said described personal property forthcoming to answer the final judgment of the court in said case and pay the final condemnation money as provided by the statute." The claim case proceeded to trial, and resulted in a verdict and judgment subjecting the property to the payment of the mortgage execution. The levying officer duly advertised the property for sale, and gave personal notice to Mrs. Reese and to Hart of the time and place of sale. Mrs. Reese did not pro-

duce the property on the day of sale, and Worsham & Co. brought suit in the justice's court for a breach of the bond. This suit was appealed to the superior court, and on the trial of the appeal it appeared that, subsequently to the execution of the Worsham mortgage, Mrs. Reese had executed to one Ryals a mortgage on the same property as that described in the Worsham mortgage. This mortgage had also been foreclosed and execution issued and levied upon the property after the date of the execution on the Worsham mortgage. To this levy Mrs. Reese, as guardian, also interposed a claim, and gave a forthcoming bond. On the trial of this claim case the property was found subject. The levying officer advertised the property for sale, which was to take place one month later than the day on which the property was advertised to be sold under the Worsham execution. Mrs. Reese produced the property to be sold under the Ryals execution, and it was sold and the proceeds of the sale applied to that execution. On the same day that this sale took place, Worsham & Co. recovered in the justice's court a verdict against Mrs. Reese and Hart as security for a breach of the bond. Mrs. Reese contended that, under the facts above detailed, judgment ought to be rendered in favor of the defendants. Hart filed a separate plea setting up that the conduct of the plaintiffs and their attorney had been such as to increase his risk and expose him to greater liability, in that he (Hart) had notified the officer conducting the sale under the Ryals execution to apply the proceeds to the senior execution of Worsham & Co., but that the officer, under the advice of counsel for Worsham & Co., had applied the proceeds of the sale to the Ryals execution. On the trial Hart offered to ⁴⁵¹ prove by the officer who conducted the sale that counsel for defendants had instructed him to apply the fund in his hands to the Worsham execution, and that the officer thereupon consulted with counsel for the plaintiffs, and he did not object to the appropriation of the money to the Ryals execution, stating that he had proceeded on the bond and obtained judgment against the defendants. This evidence was objected to by the plaintiffs, on the ground that at the time plaintiffs' attorney made the statement above referred to there had already been a breach of the bond and judgment recovered thereon in the justice's court by the plaintiffs, and on the further ground that the evidence was irrelevant and immaterial. The objection was sustained and the evidence rejected. After the evidence was all in, the court directed the jury to return a verdict finding in

favor of the plaintiffs. The defendants thereupon excepted, assigning as error the direction of the verdict and the refusal to admit the evidence above referred to.

1. The bond sued on in the present case was not void. It is true it is not a statutory forthcoming bond; for the statute requires that such a bond shall be conditioned "for the delivery of [the] property at the time and place of sale": Civ. Code, sec. 4614. Indeed, the bond sued on was not a statutory bond at all. There is no provision of law allowing a claimant of property to retain possession thereof upon the execution of such a bond. The levying officer may be liable in damages for his failure to take a regular forthcoming bond, but, as between the obligor and her surety and the plaintiff in execution, the bond actually executed was a good contract and enforceable as such. If, therefore, there has been a breach of the contract, the defendant in execution is liable to the plaintiffs in execution for whatever damages they have sustained by reason thereof.

There is nothing in the above views to conflict with the decision in *King v. Castlen*, 91 Ga. 488. When read in the light of its facts, that case simply rules that parol promises made by the sheriff to a claimant, both before and after he had executed a perfect statutory forthcoming bond, that he (the sheriff) would sell the property, which was heavy and expensive to transport, where it was situated, instead of at the courthouse door, were ⁴⁵² void. Any language in the headnote or opinion which would indicate any other ruling is purely obiter. The bond sued on in the present case was not a forthcoming bond at all, nor was there any effort to vary the terms of the same by any parol promise of the levying officer; and consequently the principle of the decision referred to can have no application whatever. Mrs. Reese contracted "to have the said described personal property forthcoming to answer the final judgment of the court." This she failed to do when, after notice, she omitted to have the property forthcoming, to be sold in satisfaction of the claim of plaintiffs: See *Brumby v. Barnard*, 60 Ga. 292. That she surrendered it in obedience to a regular forthcoming bond subsequently given by her when she filed a claim to the levy of an execution junior to the one under which the first claim was filed will not relieve her from liability on her contract with plaintiffs.

2. There having been a breach of the contract, the plaintiff in execution had a right either to proceed against the defendant in execution and her surety for a breach of the contract, or to

have the property sold, if he could find it, in satisfaction of his mortgage lien: *Chesapeake Guano Co. v. Wilder*, 85 Ga. 550, 552. It was, therefore, no concern of the surety that the plaintiff in execution elected to pursue the first remedy. The surety contends, however, that the evidence rejected set forth facts which showed that by the act of the plaintiff in execution his risk had been increased and he had been exposed to greater liability, within the meaning of section 2972 of the Civil Code. Conceding that a positive direction by the plaintiff in execution to the officer to apply the proceeds of the sale to the junior rather than to the senior execution would be such an act as would increase the risk of the surety or expose him to greater liability within the meaning of that section, we do not think the evidence rejected, properly construed, warrants the conclusion that the plaintiff in execution or his attorney did this. The evidence was, that counsel for the plaintiff in execution did not object to the appropriation of the money to the junior execution, saying that he had proceeded on the bond and obtained judgment. In other words, his position was that he had elected his remedy, ⁴⁵³ that is, to sue on the bond, had obtained judgment, and was content to rely on his ability to enforce the judgment. Occupying this position, it, of course, made no difference to him what disposition was made of the money which arose from the sale of the property. There was no error in directing a verdict in favor of the plaintiffs.

Judgment affirmed.

All the justices concurring.

FORTHCOMING BONDS.—ON THE LIABILITY OF SURETIES on forthcoming bonds, see the recent cases of *Troy v. Rogers*, 116 Ala. 255, 67 Am. St. Rep. 110; *Ayres etc. Co. v. Dorsey Produce Co.*, 101 Iowa, 141, 63 Am. St. Rep. 376; *Wills v. Chowning*, 90 Tex. 617, 59 Am. St. Rep. 842.

TEASLEY v. BRADLEY.

[110 Georgia, 497.]

LIMITATION OF ACTIONS—FACTORS AND AGENTS.—

A factor in possession of funds belonging to his principal, when there is nothing in the contract or the custom of the place requiring that the funds should be paid over any particular time, cannot set up title to such funds without notice to the principal that he no longer holds them for his benefit. The statute of limitations does not begin to run in his favor until such notice, or until there has been a demand and refusal to pay, or an account rendered accompanied by an offer to settle.

LIMITATION OF ACTIONS—FACTORS AND AGENTS.—If

one person receives money from another from time to time, to invest and collect the principal or interest, and reinvest the money from time to time for the benefit of such other, and it is contemplated by the agreement between the parties that the person receiving the money shall use it for the benefit of such other, and there is no time specified when the money is to be returned, such person holds the fund subject to the demand of the other, and no limitation runs against the person owning the fund in favor of the person collecting it until there has been a demand and refusal, or such a lapse of time that the law presumes a demand and refusal, or until an account has been rendered, accompanied by an offer to settle, or the one in possession has notified the owner that he no longer holds the fund as the owner's, but claims title to it himself.

LIMITATION OF ACTIONS.—Trustees in technical trusts cannot, during the continuance of the trust, plead the statute of limitations against the claim of the cestui que trust.

LIMITATION OF ACTIONS—AGENCY.—If an agent is appointed for the sole purpose of collecting and paying over money, the statute of limitations begins to run in favor of the agent from the time that the fact that the collection has been made came to the knowledge of the principal.

LIMITATIONS—LOANS.—Money loaned with no agreement as to the time of repayment is due immediately, and the statute of limitations begins to run at once in favor of the borrower.

PLEADING—DEMURRER.—A complaint setting forth a legal cause of action, though using words and terms appropriate to an equitable proceeding, in so far as it does not seek any extraordinary relief, is not demurrable on the ground that plaintiff has an adequate remedy at law.

ESTOPPEL.—ESTATES OF DECEDENTS.—One who has possession of the estate of a decedent without administration, and with the acquiescence of the heir at law upon an agreement with the latter to manage and invest the estate for him, is accountable directly to him, and cannot defeat a suit brought against him by such heir by claiming that the right of action is in the administrator of the decedent.

EVIDENCE.—ADMISSIONS OF LIABILITY contained in an offer of settlement brought about by a demand therefor are not inadmissible on the ground that they were made with a view to a compromise, if there is nothing to show that any effort has ever been made to compromise.

EVIDENCE—CALCULATION OF ACCOUNT MADE BY THIRD PERSON.—In an action for an account and settlement, a paper embracing a calculation of such account made by a third person, and with the making of which the defendant had nothing to do, is not admissible in evidence against the latter.

TRIAL—INSTRUCTIONS.—If, in an action for an account and settlement, the defendant pleads payment, and introduces evidence in support of such defense, the failure of the court to instruct the jury thereon is error.

TRUSTS AND TRUSTEES—LIABILITY FOR PROFITS.—A trustee is liable for all profits made on the trust funds in his hands, and evidence is admissible to show that he loaned such trust funds at a usurious rate of interest.

A. G. McCurry and T. W. Teasley, for the plaintiff in error.

J. N. Worley, O. C. Brown, and W. L. Hodges, for the defendants in error.

⁴⁹⁰ COBB, J. On February 17, 1898, Laura Sadler brought suit against Isham A. Teasley, alleging in her petition, substantially, the following: Plaintiff, Cynthia, Martha, and Mary Sadler were the children of James and Priscilla Sadler. Martha married the defendant. Their mother having died, their father married a rich widow, and in 1863 moved to her home and left his plantation, and personalty thereon, under the control and management of defendant, with the understanding that he was to manage the same for the benefit of those interested. On April 16, 1866, James Sadler, in consideration of love and affection, conveyed the plantation, consisting of three hundred and eleven acres, to plaintiff, Cynthia, and Martha. Plaintiff and Cynthia lived with defendant on the place until 1874, when Cynthia died, leaving her estate "in the custody and control" of defendant. Plaintiff at the solicitation of defendant lived in his family from the date of his marriage until a recent date, a period of forty-four years, during all that time performing labor, manual and otherwise, in and about the household, and living meanwhile in a most frugal manner. Plaintiff trusted defendant with the absolute control and management of all her property, and turned over to him during the years 1869, 1872, 1874, and 1877 sums of money aggregating seventeen hundred dollars upon his statement that he would take the money and loan it at a good rate of interest; and in like manner for a like purpose plaintiff turned over to defendant three hundred dollars in 1873; all of which he received in trust for ⁵⁰⁰ plaintiff, stating that he would render a just and true account when called upon, which he has failed to do. De-

defendant had control of two places in which plaintiff was interested, and from one of these, in which she inherited an interest from her father, collected in 1872 and 1873 rent belonging to plaintiff amounting to fifteen dollars each year, and from 1874 to 1876, inclusive, he collected twenty-five dollars per year, and from the other place he collected plaintiff's interest in the rents from 1873 to 1897, inclusive, amounting to one hundred dollars per year, he having agreed to manage the farms, collect the rents, hold them in trust for the parties interested, and render a just and true account when demanded, which he has failed to do. Defendant has loaned the different sums belonging to plaintiff at a high rate of interest and collected the same. In August, 1897, plaintiff demanded of defendant that he pay over to her the amount due her, which he refused to do. The prayer of the petition was for an accounting, and judgment in favor of plaintiff for such an amount as should be found due. By amendment plaintiff alleged: Defendant was her continuous general agent to invest, keep, control, and reinvest all funds and property of hers that went into his possession, without accounting to plaintiff until a demand was made. No such demand was made until 1897. Plaintiff "actually or constructively received" her interest in the estate of her deceased sister Cynthia, and afterward turned the same over to defendant to be dealt with in the same manner as her other property in his hands. To the petition and amendment the defendant filed demurrers, both general and special. The court overruled the demurrers, and this is one of the errors assigned. The answer of the defendant denied all allegations seeking to charge him with any liability, set up the statute of limitations as a defense, and alleged that on a fair settlement it will appear that he owes the plaintiff nothing; that the amount due by plaintiff for board, medical attention, and other living expenses, all of which were provided by defendant, and other charges against plaintiff which were paid by defendant at the request of plaintiff, would more than equal any claim that plaintiff had against him; that defendant never occupied any trust relation to plaintiff, and the only relation existing between them was that of debtor and creditor, which arose ⁵⁰¹ as each sum due plaintiff was collected; and that the transactions between plaintiff and defendant amounted at most to nothing more than either the loan of money or an agency to collect and pay over. The case coming on for trial, at the conclusion of the evidence introduced by plaintiff defendant made a motion for a nonsuit, which the court over-

ruled, and this is one of the errors assigned. The jury returned a verdict in favor of the plaintiff. The defendant made a motion for a new trial, which being overruled, he excepted. After the writ of error was sued out and before the case was called here, the plaintiff died and the administrators on her estate were made parties in this court.

1. As long as a person who is in possession of the property of another, using the same for the owner's benefit, recognizes the latter's ownership, no lapse of time will bar the owner from asserting his title as against the person in possession. Before any lapse of time will be a bar to the owner it must appear that the person in possession has given notice, or there must be circumstances shown which would be equivalent to notice, to the owner that the person in possession claims adversely to him. In such a case the statute will begin to run from the date of such notice. Until the owner has such notice he has the right to treat the possession of the other person as his own: *Keaton v. Greenwood*, 8 Ga. 97. This is the principle at the foundation of that familiar rule now embodied in section 3198 of the Civil Code, that "subsisting trusts, cognizable only in a court of equity, are not within the ordinary statutes of limitation." Chancellor Kent, in *Kane v. Bloodgood*, 7 Johns. Ch. 90, 11 Am. Dec. 417, states the same rule in the following language: "The trusts intended by the courts of equity not to be reached or affected by the statute of limitations are those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar, and exclusive jurisdiction of this court." Although the rule just stated is applicable in terms alone to cases of technical trusts which are cognizable only in a court of equity, the principle upon which it is founded is applicable in some cases where a technical trust had not been created; the principle being as above stated, that as long as one recognizes that property in his possession belongs to another, the latter has the right to treat ⁵⁰² the possession as his own. The factor in possession of funds belonging to his principal, when there is nothing in the contract or the custom of the place requiring that the funds should be paid over at any particular time, cannot set up title to such funds without notice to the principal that he no longer holds the same for his benefit, and the statute of limitations does not begin to run in his favor until such notice, or there are circumstances equivalent to notice, or until there has been a demand and refusal to pay, or there has been an account rendered accompanied by an offer to settle. In England a similar rule

has been applied in the case of bailiffs and stewards who collected rents and held the same subject to the order of their principals. The rule was also applied in cases of agents having possession of the funds of the principal, when, as in the case of factors, neither under the contract nor the custom of the trade the money was to be paid over at any particular time. In all such cases the property in the hands of the factor, bailiff, steward, or agent, as the case may be, is treated as the property of the principal, and the possession of the agent is the possession of the principal, and no right of action accrues in favor of the principal until a demand and refusal, or a notice, or, what is equivalent thereto, that the agent is holding adversely, and not until the right of action accrues does the statute of limitations begin to run in favor of the agent. This rule is, in some cases, subject to the exception that after the lapse of a reasonable time a demand will be presumed, and the statute of limitations will begin to run from the time such demand would be presumed to have been made: See, in this connection, 1 Wood's Limitation of Actions, 2d ed., sec. 123; 2 Perry on Trusts, 5th ed., sec. 863; Mechem on Agency, sec. 533; *Oliver v. Hammond*, 85 Ga. 323, 331; *Patterson v. Blanchard*, 98 Ga. 518; 27 Am. & Eng. Ency. of Law, 1st ed., 100 et seq.; *Blount v. Beall*, 95 Ga. 182.

Where one receives money from another from time to time to invest and collect the principal or interest, and reinvest the same from time to time for the benefit of another, and it is contemplated by the agreement between the parties that the person receiving the money shall use the same for the benefit of the other, and there is no time specified when the money is to be returned, ⁵⁰³ such person would hold the same subject to the demand of the other, and no limitation would run against the person owning the fund in favor of the one who had collected it until there had been a demand and refusal, or there had been such a lapse of time as that the law would presume a demand and refusal, or until an account had been rendered, accompanied by an offer to settle, or the one in possession notified the owner that he no longer held it as the owner's, but claimed title to it himself. Applying this rule to the allegations of the present petition, there was no error in overruling the demurrer, so far as it raised the point that the plaintiff's cause of action was barred by the statute of limitations, and that the demand of the plaintiff had become stale. The amendment to the petition merely amplified the allegations in

the original petition, and was therefore not subject to the objection raised in the demurrer thereto, that it set forth a new and distinct cause of action. The relation existing between plaintiff and defendant was not such that a technical, subsisting trust, cognizable only in a court of equity, would result therefrom; and for this reason the provisions of sections 3149 and 3153 of the Civil Code, requiring express trusts to be declared in writing, and prohibiting the creation of such a trust in favor of a person sui juris who is laboring under no disability, have no application in the present case. While such a trust was not created and not intended to be created between the parties, the same principles, which are at the foundation of the rule which prevents a trustee in a technical trust from pleading the statute of limitations against the claim of the cestui que trust, would prevent an agent of the character that the allegations in the petition make the defendant from relying upon the statute of limitations as a defense, until there had been an account rendered accompanied by offer to settle, a refusal upon demand to settle, an express repudiation of the agency, or such a change in the relations between the parties as would be sufficient to put the principal on notice that the agency was no longer recognized. As an instance in which this rule was applied where no express trust existed, see *Oliver v. Hammond*, 85 Ga. 323. Until one or the other of these contingencies happened, the possession of the defendant was the possession of the plaintiff, and no limitation of ~~504~~ time would operate to debar the latter from calling the former to account, with the single exception that if the nature of the transactions was such that, after the lapse of a reasonable time, the law would presume a demand and refusal, then the statute would begin to run from the date such demand would be presumed. If the relation which the defendant bore to the plaintiff was that of a confidential continuing agent, no such presumption would arise until such relation ceased. The evidence introduced in behalf of the plaintiff tended to establish the allegations in the petition as to the character of the agency under which the defendant managed and controlled the funds of plaintiff; and such evidence, as a whole, being sufficient to authorize a recovery by the plaintiff of at least a portion of the amount claimed by her, there was no error in overruling a motion for a nonsuit. Certain portions of the charge made the subject of assignments of error in the motion for a new trial

were substantially in accord with what is now ruled, and were therefore not erroneous.

2. The defendant contended that if he occupied the relation of agent at all to the plaintiff, he was simply her agent to collect her money, and that in such a case the statute of limitations would begin to run in his favor certainly from the time that the principal had knowledge that the agent had made the collection. When an agent is appointed for the sole purpose of collecting and paying over money, the statute of limitations begins to run in favor of the agent from the time that the fact that the collection had been made came to the knowledge of the principal: *Schofield v. Woolley*, 98 Ga. 548, 58 Am. St. Rep. 315. There being positive evidence introduced in behalf of the defendant that, as to some of the items with which it was sought to charge him, the sums came into his hands under authority simply to collect and pay over, it was error to refuse at his request to give an instruction to the jury embodying the principle above referred to.

3. When money is loaned and there is no agreement as to the time of repayment, the amount loaned is in law due immediately, and the statute of limitations begins to run at once in favor of the borrower. "If no time of payment is expressed in a bill or note, it becomes due immediately": 2 Randolph on Commercial Paper, ³⁰⁵ sec. 1038. See, also, Civ. Code, sec. 3700; *Freeman v. Ross*, 15 Ga. 252. There being evidence authorizing the jury to find that some of the money of the plaintiff which went into the hands of the defendant was the subject of a loan of the character above referred to, it was error to refuse a written request to charge, in substance, the principle above referred to; and it was also for the same reason error to charge that if "the defendant borrowed money from the plaintiff and there was no time stated for paying it back, then the statute of limitations would not begin to run against plaintiff until demand and refusal to pay, and plaintiff's right of action would not be barred until four years after such demand and refusal was made."

4. Since the passage of the uniform procedure act of 1887 (Civ. Code, sec. 4833), a plaintiff is required only to set forth his cause of action plainly, fully, and distinctly, and in an orderly way, and it is not incumbent upon him to classify or characterize his cause of action. If under the well-settled rules of law he has a legal cause of action, he will be given such remedies as are in law appropriate to his case and embraced within

the scope of his prayer. If under the principles of equity he is entitled to relief, he will be given such relief as his evidence may justify and his prayer may call for. When the relief prayed does not call for the exercise of any of the extraordinary powers of a court of equity, it is apparent that under our present system there is no place for a demurrer which raises the objection that the plaintiff has an adequate remedy at law: See, in this connection, *Georgia Iron Co. v. Etowah Iron Co.*, 104 Ga. 399; *Ray v. Home etc. Co.*, 106 Ga. 497. If a petition is filed which prays for some extraordinary relief, such as injunction, receiver, ne exeat, and the like, and it is apparent from the facts alleged that the rights of the parties can be fully protected by the use of some recognized legal remedy, such as attachment, garnishment, claim, illegality, and the like, then the existence of such a remedy would be a sufficient reason for refusing to grant the extraordinary equitable relief and for striking on demurrer so much of the petition as prays for such relief; or, if the only relief prayed was of the extraordinary character, for sustaining a demurrer to the entire petition and dismissing the case: ⁵⁰⁶ See *Hitchcock v. Culver*, 107 Ga. 184; *Bush v. Mattox*, 110 Ga. 472. It follows that there was no error in overruling that ground of the demurrer which set up that the plaintiff had an adequate remedy at law, so far as the same related to that part of the petition which alleged the facts upon which the prayer for an accounting was based. While the petition prayed for an injunction in aid of the accounting, that part of the prayer does not seem to have been insisted on, and the demurrer was not directed solely to such prayer but to the entire petition.

5. The petition alleged that the plaintiff had "actually or constructively received" her interest in the estate of her deceased sister, and turned the same over to the defendant to be held, invested, and accounted for when called on. It is inferable from the allegations that the defendant, with the acquiescence of plaintiff and the other heirs, took charge of the estate of the deceased sister without administration, and that in this way the share of the plaintiff came into the hands of defendant. It is clearly alleged that when he did come into possession it was upon the terms above referred to. Under this state of facts, it does not lie in the mouth of defendant to say, in answer to the plaintiff's demand for such share, that the right of action to recover the same is in the legal representatives of the deceased sister and not in the plaintiff as heir

at law. The special demurrer raising an objection to the right of plaintiff to maintain so much of her claim as was based on the share of her deceased sister's estate which had been collected by the defendant was properly overruled.

6. The petition alleged that since the plaintiff had demanded a settlement of defendant he had "offered to settle with her in land and sundry accounts or obligations he held against various parties, the same aggregating three thousand two hundred and sixty-eight dollars, but that plaintiff refused to accept said offer, for the reason your petitioner considered said amount inequitable and not right; all of which was an acknowledgment on the part of the defendant that he held said funds of plaintiff's in trust as aforesaid, and thereby acknowledged that he held said money, rents, and profits as a continuing and subsisting trust." This portion of the ⁵⁰⁷ petition was demurred to on the ground that the admissions therein referred to were made as a part of a "negotiation for compromise." Evidence offered to support these allegations was also objected to on the same ground. If the admissions or propositions alleged and proved were "made with a view to a compromise," of course the demurrer should have been sustained and the evidence rejected: Civ. Code, sec. 5194. There is a distinction between an offer or proposition to compromise a doubtful or disputed claim, and an offer to settle upon certain terms a claim that is unquestioned. An admission made in an offer of the latter character will be admissible when one made in an offer of the former character will not: See, as bearing somewhat on the point, *Hatcher v. Bowen*, 74 Ga. 841; *Cooper v. Jones*, 79 Ga. 379; *Akers v. Kirke*, 91 Ga. 590. The petition did not directly allege that the offer of settlement was made in an effort to compromise, nor can it be inferred from the allegations that such an effort was made. So far as the allegations are concerned, it amounted to nothing more than a demand for settlement and an offer to accede to plaintiff's demand upon certain terms, thereby impliedly acknowledging the right of the plaintiff to demand a settlement at the hands of defendant. Neither the allegations nor the proof offered in support thereof were subject to the objection that they related to a proposition to compromise.

7. The petition sought to charge defendant with the rents collected from the farm during the years 1872, 1873, and 1874, the plaintiff's right to the rents as alleged being that she had inherited an interest in the farm from her father. There was

a special demurrer to the allegation setting up this claim, on the ground that plaintiff's father "did not die till June, 1874," and that if defendant had collected the rents as alleged he was not liable to plaintiff, but was accountable to the estate of plaintiff's father. Upon a careful examination of the petition, we can find no allegation showing when the plaintiff's father died. The demurrer was a "speaking demurrer," and was properly overruled. If plaintiff's father did not in fact die until 1874, of course she has no claim against the defendant for rents collected during her father's lifetime from a farm of which he was the sole owner.

508 8. A witness for the plaintiff had made a calculation showing the various amounts for which defendant was liable to plaintiff, and the paper containing this calculation was offered in evidence and admitted over the objection of defendant that the same was "hearsay and not admissible in evidence to affect or bind defendant." There was no evidence showing that the defendant had anything to do with the preparation of the paper. We know of no law authorizing the admission of such a paper as evidence.

9. The defendant relied upon two defenses—payment and the statute of limitations. The court failed entirely to call the attention of the jury to the defense of payment. Such failure was especially error in the present case, when the effect of the failure was to leave the defendant with the sole defense of the statute of limitations; and the charge on that subject was, as we have seen, not entirely free from errors that were prejudicial to the defendant.

10. The foregoing embraces a discussion of all the questions which arose in the case that are of sufficient importance to require anything like elaborate notice. There are many other questions in the record, and, as the case is to be retried, we will briefly notice such as will probably arise again. There was no error in admitting the testimony of the plaintiff to the effect that a portion of the money claimed by her was derived under a parol gift from her sister, and a certain other portion under a parol gift from her father, as against the objections that at the time of the trial the sister and the father were dead. A trustee is liable for all profits made on the trust funds in his hands; and as the defendant, under the contention of the plaintiff, occupied the relation of a quasi trustee, there was no error in admitting evidence tending to show that he had loaned the money of plaintiff at a usurious rate of interest. What the

defendant's wife said to plaintiff about her presence in defendant's household being absolutely indispensable was clearly hearsay, and should not have been admitted. That defendant had no property when he married into the Sadler family, and what defendant was worth at the time of the trial, were facts entirely immaterial in the determination of the issues involved in this case. One of the defenses ⁵⁰⁹ being that plaintiff's claim had been discharged in part by defendant furnishing her with board at his home, evidence as to what such board would be worth was admissible. Declarations made by defendant as to what plaintiff and her sister, who lived in defendant's family, were worth were properly admitted. There was no error in refusing to allow the defendant to show what expenses he had incurred growing out of the last sickness and death of plaintiff's father. Let the case be tried again in the light of the rulings herein set forth.

Judgment reversed.

All the justices concurring.

IN THE CASE of *Payne v. Bowdrie*, 110 Ga. 549, it was held that if one, as trustee under a will, is chargeable with funds to be held for the benefit of one for life, with remainder over to her children, if any, and, if not, to other designated persons, and in an equitable proceeding to which both he and the cestui que trust are parties, it is decreed that he pay the entire fund held by him as trustee to the cestui que trust in her absolute right, such decree is binding upon the trustee, although it purports to cut off the rights of contingent remaindermen. "The trustee is also finally concluded by any other adjudications embraced in such decree, in so far as the decree was based upon and warranted by the pleadings, and while, under such a decree, it is incumbent on the trustee to settle at once with the cestui que trust, until he does so and takes an acquittance from the latter his relation to the cestui que trust continues to be that of trustee, and the statute of limitations applicable in such a case is that which the law provides as to suits against trustees, to wit, the limitation of ten years."

AGENCY—LIMITATION OF ACTIONS.—If a party acts as a general agent or factor, with no stated time for accounting, the statute of limitations will not run in his favor against his principal until an account is rendered or a demand therefor is made. This principle applies where money is deposited with an agent to loan or invest. If, however, the agency is special, the statute attaches upon the consummation of the transaction; and, in case of a collecting agent, the tendency is to hold that the statute begins to run immediately, regardless of whether a demand is made: See the monographic note to *Miles v. Thorne*, 99 Am. Dec. 393, 394; *Douglas v. Corry*, 46 Ohio St. 349, 15 Am. St. Rep. 604; *Schofield v. Woolley*, 98 Ga. 548, 58 Am. St. Rep. 315.

TRUSTS.—THE STATUTE OF LIMITATIONS, as between cestui que trust and trustee, does not run so long as the trust continues: *Miles v. Thorne*, 38 Cal. 325, 99 Am. Dec. 384. See, too, *Jones v. Home Sav. Bank*, 118 Mich. 155, 74 Am. St. Rep. 377.

LIMITATION OF ACTIONS.—A LOAN OF MONEY to be paid when called for is due when made, and the statute of limitations runs from that time: *Ware v. Hewey*, 57 Me. 391, 99 Am. Dec. 780.

EVIDENCE—COMPROMISE.—Statements made in the course of negotiations looking to a compromise cannot be admitted in evidence against the party making them, if the effort to compromise proves abortive: *Robertson v. Blair*, 66 S. O. 96, 76 Am. St. Rep. 543.

CANNON v. PHOENIX INSURANCE COMPANY.

[110 Georgia, 563.]

INSURANCE—FIRE—PROOF OF LOSS.—If a policy of insurance stipulates that if fire occurs the insured shall give immediate notice of any loss thereby in writing to the company, and, in sixty days after the fire, shall render a sworn statement stating the knowledge and belief of the insured as to the time and origin of the fire, and that, in the absence of compliance with such stipulations, no action can be maintained against the insurer, the submission of proofs of loss to the insurer within the time prescribed is a condition precedent to the payment of the loss or the maintenance of an action.

INSURANCE—FRIENDLY FIRES.—If fire is employed as an agent, either for the ordinary purposes of heating the insured building, for the purposes of manufacture, or as an instrument of art, the insurer is not liable for the consequences thereof, so long as the fire itself is confined within the limits of the agencies employed, as from the effects of smoke or heat evolved thereby, or escaping therefrom from any cause, whether intentional or accidental.

INSURANCE—FIRE—SMOKE AND WATER—FRIENDLY FIRES.—Under a policy of insurance against all direct loss or damage by fire, the insurer is not liable for damage arising from smoke and soot escaping from a defective stovepipe and resulting from a fire intentionally built in a stove and kept confined therein, nor for damage caused by water used in cooling a portion of the building heated by such stovepipe, when the use of such water is not necessary to prevent ignition.

INSURANCE—FIRE—EVIDENCE—PROOF OF LOSS.—In an action on a fire insurance policy, parol evidence is not admissible on the part of plaintiff to prove a fact in support of his claim of loss, when no proof thereof has been made and presented to the insurer prior to the institution of the suit, and it does not appear from the record that such fact was not discovered by plaintiff before suit was brought.

R. J. and J. McCamy, for the plaintiff.

Smith, Hammond & Smith, King & Spaulding, and Shumate & Maddox, for the defendant.

⁵⁶⁴ LEWIS, J. This was a suit brought in Whitfield superior court by A. E. Cannon against the Phoenix Insurance Company of Hartford, Connecticut, on an insurance policy issued by the company on plaintiff's stock of merchandise alleged to have been insured and damaged by fire, the loss amounting to three thousand dollars, and the defendant's liability therefor pro rata with other concurrent insurance being three hundred dollars. On the trial of the case plaintiff introduced the policy of insurance, one material part of which is as follows: "In consideration of the stipulations herein named, and of thirty-seven and 50-100 dollars premium the [said company] does insure A. E. Cannon for the term of one year from the fifteenth day of February, 1897, at noon, to the fifteenth day of February, 1898, at noon, against all direct loss or damage by fire, except as hereinafter provided, to amount not exceeding twenty-five hundred dollars, upon the following described property, to wit: . . . on her stock of merchandise consisting chiefly of drygoods, notions, hats, clothing, caps, boots and shoes," etc. Plaintiff then offered to read in evidence the proof of loss made and given by plaintiff to defendant, the material part of which is as follows:

"To the Phoenix Insurance Company of Hartford, Conn.

"By your policy of insurance No. 1115 issued by your agent at Dalton, Ga., on the 15th day of February, 1897, for the term of twelve months you insured the undersigned, A. E. Cannon, against ⁵⁶⁵ loss by fire to the amount of twenty-five hundred dollars on her stock of merchandise consisting of clothing, drygoods, notions, boots, shoes, hats and caps, while contained in the two-story brick, metal roof building situated at Nos. 553 and 554 on the east side of Hamilton street, Dalton, Ga., block No. 4. On the third day of November, 1897, the same was damaged by fire in the following manner: in arranging the stove on the ground floor of the building the day before, the pipes thereof which extended through the ceiling and through the second story of the building became disengaged at the ceiling of the second floor; when a fire was built in the stove on the morning of the third of November, the smoke and soot escaped into the second-story room where the damaged goods were situated. When the trouble was discovered the room was full of smoke and soot, and the ceiling where the pipe went through was very hot, and by reason of the smoke and soot and of the water used in cooling the ceiling the goods were damaged as here set out."

Then followed in said proof of loss a statement of the other insurance on the same goods, together with a complete inventory of the goods damaged with the amount of damage claimed thereon. To the introduction in evidence of this proof of loss the defendant objected, on the ground that in said proof of loss it is stated that the goods were injured simply by reason of the smoke and soot, and that there is no allegation in said proof of loss that there was any actual burning of anything except the material put in the stove purposely to burn, and that the said proof of loss did not show or claim to show that there was any loss or damage by fire under the terms of the policy. The court thereupon sustained the objection. Plaintiff's counsel then stated to the court that when said proof of loss was furnished, and for some months afterward, it was not known to the plaintiff that there had been any actual burning, and they were prepared to show that in about three months after the injury to the goods the plastering on the ceiling of the second-story room fell down, and disclosed the fact that some of the laths and joists to which they were nailed had in fact taken fire and were charred. Counsel for defendant objected to the admission of this testimony, upon the ground that it was irrelevant and incompetent; that ⁵⁶⁶ the furnishing of a proof of loss showing a loss under the policy was a condition precedent to any liability under the policy; and that it was not competent for the plaintiff, after having furnished a proof of loss satisfactory to the defendant, which showed no loss by fire under the terms of the policy, and after having brought a suit based on such proof of loss, to now undertake to prove a loss by fire by parol evidence offered for the first time on the trial of the case. The court sustained the objection, and ruled the testimony inadmissible. Counsel for plaintiff then admitted that, without a proof of loss, he was unable to make out the case, and that a nonsuit was inevitable; and defendant's counsel thereupon presented to the court and took an order granting a nonsuit. To these rulings of the court the plaintiff excepted.

1. The contract between the parties stipulates that if fire occur the insured shall give immediate notice of any loss thereby in writing to the company, and, in sixty days after the fire, shall render a statement to the company, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the time and origin of the fire, etc. It is further stipulated that no suit or action on the policy for the recovery of any claim shall be sustainable in any court of law or equity,

until full compliance by the insured with this requirement. Under the stipulations in the policy there can be no question that, as a condition precedent to the payment of the loss, the proofs of loss should be submitted to the company within the time prescribed: *Southern Home etc. Assn. v. Home Ins. Co.*, 94 Ga. 167-169, 47 Am. St. Rep. 147. The sufficiency of such proofs on the trial of the case is a question for the court, and, to be sufficient, they should show a loss within the terms of the policy: *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751-764. The question, then, is whether the proofs of loss submitted in this case were within the meaning of this policy. It seems that in arranging the stove on the ground floor of the building the day before the damage, the pipe, which extended through the ceiling of the second floor, became disengaged at that ceiling, and that, when the fire was built in the stove on the next morning, smoke and soot escaped from the pipe into the second-story room where the damaged ~~507~~ goods were situated. The damage claimed, therefore, in the notice of loss was by reason of the smoke and soot, and of the water used in cooling the ceiling. It does not appear from the proofs of loss that there was any fire in or about the building, except in the stove where it was intended to be built. This fire did not spread from where it was built and intended to remain. It was, therefore, all the time during the alleged injury and damage to the goods what is termed in the books a "friendly," and not a "hostile," fire. It is true there is sound authority for the proposition that an insured can recover loss occasioned by smoke, soot, etc., thrown out by a fire, but we think in these cases it will be found that such matter causing injury was the product of a hostile fire. If a fire should break out from where it was intended to be, and become a hostile element by igniting property, although it might not actually burn the property insured, yet if it caused injury thereto by smoke or heat, or other direct means, damages would be recoverable. But this is not this case. In 1 Wood on Fire Insurance, section 103, the following principle is announced, directly applicable to the facts in this case: "Where fire is employed as an agent, either for the ordinary purposes of heating the building, for the purposes of manufacture, or as an instrument of art, the insurer is not liable for the consequences thereof, so long as the fire itself is confined within the limits of the agencies employed, as from the effects of smoke or heat evolved thereby, or escaping therefrom, from any cause, whether intentional or accidental.

In order to bring such consequences within the risk, there must be actual ignition outside of the agencies employed, not purposely caused by the assured, and these, as a consequence of such ignition, dehors the agencies." This seems to have been an early principle decided in England, and the author refers to that decision in a note to the text just quoted: See *Austin v. Drewe*, 6 Taunt. 436. In the case of *Gibbons v. German Ins.*, 30 Ill. App. 263, it was decided that an ordinary fire insurance policy does not cover a loss caused by escaping steam from a break in steam-heating apparatus. Gary, J., says in his opinion that in principle that case was the same as *Austin v. Drewe*, 6 Taunt. 436, where, by the omission to open a register in an upper story of a seven or ~~see~~ eight story building, smoke and heat came into lower stories and caused damage. He quotes the following language from Gibb, C. J., in that case: "There was no fire except in the stove and the flue—as there ought to have been—and the loss was occasioned by the confinement of the heat. Had the fire been brought out of the flue, and anything had been burnt, the company would have been liable. But can this be said where the fire never was at all excessive, and was always confined within its proper limits? This is not a fire within the meaning of the policy, nor a loss which the company undertakes to insure against. They may as well be sued for the damage done to drawing-room furniture by a smoky chimney." In the language of Gary, J., in his opinion: "If the fire were a moral agent, no blame could be imputed to it. It was doing its duty and no more. The damage was caused by another agent who, undertaking to transmit the beneficial influence of the fire, broke down in the task": See case of *American Towing Co. v. German Fire Ins. Co.*, 74 Md. 25, and the able opinion of Alvey, C. J., on page 34 et seq.

Neither is the plaintiff entitled to recover any damages caused by the water used in cooling a portion of the ceiling heated by the pipe. In the proofs of loss it is not claimed that anything was actually ignited by this heat, and it does not appear that the use of the water was necessary to prevent ignition.

2. It is contended that the court erred in refusing to allow plaintiff's counsel to show that, after making out their proofs of loss, they discovered that some of the laths and joists had actually become ignited and were charred. Even if this were true, and damage were caused to the property of plaintiff by

this ignition, it would not have been admissible in the trial of the present case, for the reason that no proof thereof had been made and presented to the company prior to the institution of this suit; and it does not appear from the record that this fact was not discovered by plaintiff before suit was brought. Besides, there was nothing in the testimony offered which in the least tends to indicate that any injury or damage was done the goods of plaintiff by virtue of the igniting or charring of the laths or joists of the building. It is not pretended even that the ⁵⁶⁰ smoke and soot which injured the property proceeded from that fire. Our conclusion, therefore, is that the court did not err in rejecting the testimony offered and in granting a nonsuit.

Judgment affirmed.

All the justices concurring.

A FIRE INSURANCE POLICY DOES NOT COVER damage by overheating, without combustion, by the unskillful use of fire in a factory: *Scripture v. Lowell etc. Ins. Co.*, 10 Cush. 356, 57 Am. Dec. 111. See, further, the notes to *Hillier v. Allegheny etc. Ins. Co.*, 45 Am. Dec. 657-661; *Renshaw v. Missouri etc. Ins. Co.*, 29 Am. St. Rep. 915-917; *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 857-859, on what is included under a loss by fire.

INSURANCE.—PROOF OF LOSS stipulated for in a policy of fire insurance must be made within the time stipulated, as a condition precedent to the payment of the loss: *Southern etc. Assn. v. Home Ins. Co.*, 94 Ga. 167, 47 Am. St. Rep. 147; *German Ins. Co. v. Fairbank*, 32 Neb. 750, 29 Am. St. Rep. 459. See, also, *Ermentrout v. Girard etc. Ins. Co.*, 63 Minn. 305, 56 Am. St. Rep. 481.

MORRIS v. DODD.

[110 Georgia, 606.]

INSURANCE—LIFE—BANKRUPTCY.—A policy of insurance on the life of a bankrupt, payable to his legal representatives, and having no cash surrender value and no value for any purpose except the contingency of its becoming valuable at the death of the bankrupt if the premiums are kept paid, does not vest in the trustee in bankruptcy as assets of the bankrupt's estate.

J. A. Anderson, King & Anderson, Dorsey, Brewster & Howell, and A. Heyman, for the plaintiffs in error.

Mayson & Hill and O. E. & M. C. Horton, for the defendant in error.

606 FISH, J. This was a petition filed by Harry Dodd, trustee of the estate of John F. Morris, bankrupt, against his widow, Mrs. V. A. Morris, the Mutual Reserve Fund Life Association of New York, and the Northwestern Mutual Life Insurance Company, in which it was sought to enjoin Mrs. Morris from collecting, and the two insurance companies from paying to her, the amounts of insurance policies issued by the defendant companies upon the life of the bankrupt. The Northwestern company paid the money due upon the policy issued by it into the registry of the court, to await the final decree of the court. Mrs. 607 Morris and the other insurance company answered the petition. Upon the hearing it appeared that each of the insurance companies had issued a policy upon the life of John F. Morris, payable to his legal representatives; that the one by the Northwestern company was issued in 1890, the date of the issuance of the other not appearing. It further appeared that, during the month of April, 1899, Morris surrendered his policy in the Mutual Reserve Fund Life Association, and the association thereupon issued a new policy, upon the same terms as the old, in which new policy Mrs. V. A. Morris, his wife, was the beneficiary, and that during the same month Morris assigned the policy which he held in the Northwestern company to his wife, the assignment being accepted by the company. Morris' petition in voluntary bankruptcy was filed on the twenty-ninth day of the same month. He died in the following October, pending the proceedings in bankruptcy, and immediately after his death Dodd, the trustee of his estate, filed this petition. The contention of the trustee was, that the transfers of the policies were made with intent to hinder, delay, or defraud the creditors of the bankrupt, and, having been executed within four months prior to the filing of the petition in bankruptcy, were void, and that the policies vested in the trustee at the time of the adjudication in bankruptcy, as part of the assets of the bankrupt's estate. Section 67e of the bankrupt act of 1898 provides: "That all conveyances, transfers, assignments, or encumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act, subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of

the debtor conveyed, shall be and remain a part of the assets and estate of the bankrupt, and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors." Section 70a of the act provides: "The trustee of the estate of a bankrupt, upon his appointment ^{and} qualification, shall be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, to all property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him; provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings; otherwise the policy shall pass to the trustee as assets."

Under the view we take of the question presented for determination, it is immaterial that the policies of insurance were transferred by the bankrupt to his wife within four months prior to the filing of his petition in bankruptcy. Upon the hearing there was no evidence submitted for the trustee that either of the policies had any cash surrender value, either at the time of the transfer or at the time of the filing of the petition in bankruptcy, but there was much evidence in behalf of the defendants that the policies had no such value at either of the times indicated. If the policies, then, had no cash surrender value, we are of opinion that they would not vest in the trustee as assets of the bankrupt's estate, even if no changes had been made in them, and they had, to the date of his death, remained payable to his legal representatives. The exact point was decided in *In re Buelow*, 98 Fed. Rep. 86, where it was held: "A policy of insurance on the life of a bankrupt, which has no cash surrender value, and no value for any purpose except the contingency of its becoming valuable at the death of the bankrupt if the premiums are kept paid, does not vest in the trustee as assets of the estate," and the court directed the trustee to deliver the policy to the petitioners, the bankrupt and his wife. District Judge Shiras, in *In re Steele*, 98 Fed.

Rep. 78, while holding that where a bankrupt held a policy payable to himself, his heirs or legal ⁶⁰⁹ representatives, the surrender value thereof would be part of the assets of his estate in bankruptcy, very clearly intimated that this would not be so if the policy had no cash surrender value. To the same effect, see *In re Lange*, 91 Fed. Rep. 361. In the case of *Aetna Nat. Bank v. United States Life Ins. Co.*, 24 Fed. Rep. 770, it was held that a bill in equity could be maintained by creditors of a deceased debtor to reach premiums paid to a life insurance company in fraud of them, but that they could have no claim upon the insurance, even in such a case, beyond the amount of the premiums and the interest thereon. Under the bankruptcy act of 1867, in *In re McKinney*, 15 Fed. Rep. 535, it was held: "An assignee in bankruptcy has no insurable interest in the life of a bankrupt, at least after his discharge. Upon a policy on the life of the bankrupt, payable at his death to his executors, administrators, or assigns, with an equal premium payable annually during the bankrupt's life, the only beneficial interest which passes to the assignee in bankruptcy is its surrender value or net reserve at the time of the bankruptcy. Beyond that interest the policy, so far as respects any future insurance under it, would be a burden rather than a benefit, which the assignee is not authorized to continue, and the assignee takes the legal title to the policy for the purpose of making the surrender value or net reserve available to the estate."

In *Holt v. Everall*, an English case, decided by the court of appeal, under the British bankruptcy act of 1869, reported in 34 L. T., N. S., 599, it appeared that in 1870 a trader effected policies of insurance on his own life. In the following year, wishing his wife might have the benefit of the policies under the married woman's act, he surrendered them to the insurance company, and received, in substitution therefor, policies at the same premiums payable on the same day, and entitled to the same privileges as the former, and which provided that the sums assured should be paid to the wife. Within two years from the date of the substituted policies the husband liquidated, dying before the discharge. The trustee claimed the insurance. It was held that as the policies of 1870 had no surrender value, the transaction of the following year was not a settlement of property under the bankruptcy act of 1869, and that the widow ⁶¹⁰ was entitled to the policy money. In speaking of the substitution of one policy for another, James, L. J., in

his opinion, said: "If it could be made out that this was a device to avoid the ninety-first section of the bankruptcy act of 1869, and that there was any actual property, anything which the court could construe as of value, settled at that time, then probably the court would say: We cannot allow a device to be resorted to for the purpose of making that thing appear to be not a settlement which was in truth a settlement. . . . In that point of view, it is important to see whether there was any actual property—anything that could be called property—at the time when the husband effected the policies in question. If the husband at that time gave up anything of real value as part of the consideration for the new policies, there might be some question, but I am satisfied that that which was given up was not of the slightest value whatever, that there was nothing taken away from the creditors in point of substance, and that the transaction, as far as the creditors were concerned, was in substance exactly the same as if the policies in 1871 had been made without any reference whatever to the existing policies of 1870, which the husband might have given up at any moment he liked, or forfeited, or done anything he liked with. Therefore there is nothing substantial arising from the fact that the policies of 1871 were in exchange for the policies of 1870." Mellish, L. J., in his concurring opinion, used the following language: "I agree with the lord justice . . . that if the surrendered policy really was in substance worth nothing, if it was a policy which an insolvent man would naturally allow to drop, it is very difficult to see what object an insolvent trader, knowing that he is going to become a bankrupt, has in keeping up a policy on his life, and paying the premiums, knowing that the money will go for the benefit of his creditors, or perhaps not for their benefit, because if the policy was such as this was, which had only been effected for a single year, it does no benefit to the creditors. What a trustee in bankruptcy does, if such a policy comes into his hands, is to see if he can get anything from the insurance office, and all the creditors are deprived of is the surrender value of the policy; and if there is no surrender value we may consider that the new policy effected ⁶¹¹ instead of it comes within the protection of the act" (the married women's property act). In *Exchange Bank of Macon v. Loh*, 104 Ga. 446, this court held that the only insurable interest a creditor has in the life of his debtor is for the purpose of indemnifying himself against the loss of his debt, and that such interest cannot exceed in amount that of the indebtedness

to be secured. The purpose of the bankruptcy act is to take the property owned by the bankrupt when the petition is filed and apply it toward the payment of his then existing debts, discharging him in due course from any further liability, his after-acquired property not being subject to such debts. This being true, it is apparent that the creditors represented by the trustee, whose debts cannot continue against the bankrupt, can have no insurable interest in his life for the purpose of indemnifying themselves against loss. In view, therefore, of the authorities cited and the language of the act itself, it seems that a policy of insurance on the life of a bankrupt, though payable to his legal representatives, does not vest in the trustee as assets of the bankrupt's estate, if the policy has no cash surrender value. It follows that, under the evidence submitted upon the hearing, the learned trial judge erred in granting the injunction.

Judgment reversed.

All the justices concurring.

INSURANCE, LIFE.—AN ASSIGNEE IN BANKRUPTCY has no insurable interest in the life of a bankrupt, at least after his discharge. Upon a policy on the life of the bankrupt, payable at his death to his executors, administrators, or assigns with an equal premium payable annually during the bankrupt's life, the only beneficial interest which passes to the assignee in bankruptcy is its surrender value or net reserve at the time of the bankruptcy: *Note to Continental Life Ins. Co. v. Volger*, 46 Am. Rep. 189.

AUSTIN v. STATE.

[110 Georgia, 748.]

HOMICIDE—RECKLESS USE OF FIREARMS.—The mere fact that a person handles a gun in a careless and reckless manner and death results to another therefrom does not necessarily make the person handling the gun guilty of murder. To constitute the killing murder it must appear that there was an intention on the part of the slayer to discharge the gun, and that the circumstances were such that an act of that character naturally tended to destroy human life.

HOMICIDE—RECKLESS USE OF FIREARMS.—If a person recklessly discharges a gun at another, and death results therefrom, or if he recklessly discharges a gun into a crowd, although at no particular person, and death results to some one, such killing is murder.

HOMICIDE—RECKLESS USE OF FIREARMS.—If death results to one from the discharge of a gun in the hands of another, without an intention to kill or to discharge the gun, the person in whose hands the gun was held is not guilty of murder, although the gun may have been handled in a careless and negligent, or even reckless, manner. In such case the slayer is guilty of involuntary manslaughter only, and the particular grade of that crime depends upon whether it was lawful for the slayer to be in possession of a deadly weapon at the time and place of the killing.

Blalock & Cobb, for the plaintiff in error.

J. M. Terrell, attorney general, and F. A. Hooper, solicitor general, for the state.

⁷⁴⁸ COBB, J. The accused was convicted of murder. The evidence introduced in behalf of the state authorized a finding that the accused deliberately killed the deceased by shooting her with a gun. The evidence for the defense, taken most strongly against the accused, would not have authorized a finding that he was guilty of a higher grade of homicide than involuntary manslaughter in the commission of "a lawful act without due caution and circumspection," and rather tended to show that the killing was accidental. The theory of the defense was that the ⁷⁴⁹ killing was accidental. From the statement of the accused and testimony introduced in his behalf it appeared that the accused and deceased, with others, were playing together in a house; that a gun was being handled by different members of the party; that the deceased went out of the house, and the accused followed her with the gun in his hand; that when in the yard they began again to play, and the deceased attempted to take the gun from the hands of the accused, the latter having his hand upon the stock of the gun, and the deceased having her hand upon the barrel; that, while thus engaged in a playful struggle, the gun was accidentally discharged, killing the deceased. The judge charged the jury as follows: "If a person handles a gun or pistol in a careless and reckless manner and thereby shoots and kills another, the law declares such killing to be murder, and will imply malice from the wanton and reckless disregard of human life; and such killing would be murder although there may not exist any ill-will or express malice on the part of the slayer toward the person killed." Also, that "if you should believe from the evidence in this case beyond a reasonable doubt that the defendant was carelessly and recklessly handling a gun, that it was in wanton and reckless disregard of human life, and thereby shot

and killed the deceased, the law would imply the intention to kill and the homicide would be murder. But if you should believe from the evidence beyond a reasonable doubt that the defendant negligently handled the gun in such a negligent manner that you believe it was criminal or culpable negligence, and that by reason thereof he shot and killed the deceased, but that he did not intend to kill her, he would not be guilty of the offense of murder, but would be guilty, under such circumstances, of involuntary manslaughter in the commission of a lawful act without due caution and circumspection."

These charges were erroneous, and were harmful in the present case. The mere fact that a person handles a gun in a careless and reckless manner and death results to another therefrom does not necessarily make the person handling the gun guilty of murder. In order to make such a person guilty of murder, it must appear that there was an intention on the part of the slayer ⁷⁵⁰ to discharge the gun, and the circumstances were such that an act of that character naturally tended to destroy human life. If a person recklessly discharges a gun at another, and death results therefrom, or recklessly discharges a gun into a crowd, although at no particular person, and death results to some one, it is of course settled law that such killing is murder: *Studstill v. State*, 7 Ga. 2; *Collier v. State*, 39 Ga. 31, 99 Am. Dec. 449; *Cook v. State*, 93 Ga. 200. Where death results to one from the discharge of a gun in the hands of another, and there was no intention to kill nor an intention to discharge the gun, the person in whose hands the gun was held would not be guilty of murder, although the gun may have been handled in a careless and negligent, even reckless, manner. In such a case the slayer would be guilty of involuntary manslaughter only, and the particular grade of that crime would depend upon whether it was lawful or unlawful for the slayer to be in possession of a deadly weapon at the time and place of the killing: See, in this connection, *Pool v. State*, 87 Ga. 526; *Burton v. State*, 92 Ga. 449; 1 McClain's Criminal Law, sec. 325. Applying these principles to the charges above quoted, the first and the first paragraph of the second do not contain correct abstract propositions of law, nor do we think that, even if the propositions therein contained are sound, they were applicable to the facts of the present case. If the evidence for the accused was worthy of credit, he was either not guilty of any offense, or, at most, guilty of the lowest grade of

manslaughter. If the testimony in behalf of the state was true, the accused was guilty of willful and deliberate murder.

Judgment reversed.

All the justices concurring.

HOMICIDE—RECKLESS USE OF FIREARMS.—One who brandishes a revolver in a room where there are other persons, and accidentally kills one of them, is guilty of manslaughter: *State v. Emery*, 78 Mo. 77, 47 Am. Rep. 92. So, if one unintentionally kills another by the careless use of a pistol in sport, it is manslaughter, although the victim told him to shoot: *State v. Vines*, 93 N. O. 493, 53 Am. Rep. 466. And one who fires recklessly into a crowd and kills another is guilty of murder, though he does so without any special purpose: *Golliher v. Commonwealth*, 2 Duvall, 163, 87 Am. Dec. 403. But if one in sport aims a pistol at another, both supposing it to be unloaded, and pulls the trigger, whereby the pistol is discharged and the other is killed, there is no crime: *Robertson v. State*, 2 Lea, 239, 31 Am. Rep. 602.

HENRY v. STATE.

[110 Georgia, 750.]

LARCENY BY PLEDGOR.—A pledgee has a special property in the thing pledged, and a pledgor who takes the property from the possession of the pledgee with the fraudulent intent and felonious design of depriving the latter of such possession and of his security may be convicted of larceny.

D. F. Crosland, for the plaintiff in error.

J. D. Pope, solicitor, for the state.

751 **LEWIS, J.** Sherman Henry was placed upon trial in the city court of Albany, upon an accusation charging him with entering the dwelling-house of one Tempie Mack with intent to steal, and was wrongfully, fraudulently, and privately taking and carrying away therefrom, with intent to steal the same, one suit of clothes and one bicycle of the value of fifteen dollars, the personal property of said Mack. To this accusation he pleaded not guilty. Briefly stated, the following is the substance of the testimony introduced on the trial: Tempie Mack, the prosecutrix, testified that the accused came to her to engage board. She replied to him that he would have to pay her in advance, as she had lost so much by boarders. Accused replied that he had a trunk full of clothes and a

bicycle, and that he would deliver them to her as security for the board. This conversation took place during the day, and that night the accused came back to the home of prosecutrix, bringing with him his trunk and bicycle, and said, "Here is a suit of clothes that cost me eight dollars, and a bicycle, that I turn over to you as security for my board." She accordingly received these chattels, and had them placed in a room in her house occupied by her son. The accused also was assigned to this room, where he lodged as a boarder. He kept the key to his trunk, wore the clothes, and rode the bicycle occasionally. In the trunk was a new suit of clothes. He agreed to pay two dollars per week for board, and he remained in the house as a boarder a little over three weeks, for which he was due seven dollars. A demand was made on him for the money. He left the house, leaving the bicycle and trunk therein. Two or three days afterward the landlady missed the bicycle. She then examined his trunk, and found the new suit of clothes had also been taken away. It further appeared from the testimony that the accused had sold the bicycle, and was wearing the new suit of clothes in another place where he was engaged in work. The accused introduced no evidence, but made a statement, in which he admitted ⁷⁵² that he told the landlady his trunk and clothes would be responsible for his board, but denied delivering them to her, stating that he kept the key to his trunk, wore his clothes, and rode his bicycle whenever he wished; said he did not intend to steal anything, but he put on the new suit of clothes to attend to a job in Arlington, where he was working when arrested, and simply desired to make some money so that he could pay his board. The judge of the city court, before whom the case was tried without a jury, after hearing the evidence, found the accused guilty; whereupon he made a motion for a new trial, on the general grounds that the verdict was contrary to law and evidence. To the judgment of the court overruling this motion the accused excepts.

1. There can be no question about the soundness of the proposition that property stolen from a bailee may be charged in an indictment to be his property, and authorities have even gone to the extent of holding that property stolen from one who had himself stolen it could be alleged as his. It is equally true that property in the hands of a bailee may be stolen by the general owner: Clark's Criminal Law, 246, 247; 18 Am. & Eng. Ency. of Law, 598, 599. In the case of *Wimbish v. State*, 89 Ga. 294, it was decided by this court that: "The ownership of

personal property, in an indictment for larceny, may be laid in a bailee having possession of the property when it was stolen, though the bailment was gratuitous." In *Davis v. State*, 76 Ga. 721, it appears that the accused was indicted for obstructing an officer in the execution of legal process. It seems that, after a levy of fieri facias by the sheriff, the defendant in fieri facias privately took and carried the property levied upon to an adjoining county. It was held by a majority of this court that this did not constitute the offense with which he was charged, and on page 722 Justice Blandford says: "In this case that which the plaintiffs in error did was not to oppose the officer, but it was to defeat the execution of the process by committing the crime of simple larceny. . . . The plaintiffs in error should have been indicted for simple larceny, and not for the offense for which they were indicted." From these principles it necessarily follows that when property has been delivered by the owner to one as a ⁷⁵³pledge to secure a debt, the pledgee has sufficient interest in the same to maintain a prosecution against anyone, even the general owner, by charging that the property belonged to him, the pledgee. We do not understand, however, that this principle is denied. Counsel for plaintiff in error seeks a reversal in this case upon the idea that the testimony does not show such a delivery of the property in question as would constitute a valid pledge in law. We think there is sufficient testimony for the judge to infer an actual delivery by the accused of this property as security for the payment of his board. The fact that he was permitted to use it does not deprive the pledgee in this case of the right to its custody and control. Nothing can be gathered from the evidence in the record to indicate that she ever consented to such a use or disposition of the same as to absolutely deprive her of such possession. A portion of the property pledged was actually sold to another party by the pledgor without her knowledge and consent; and the circumstances developed by the evidence touching the manner of its disposition by the pledgor were amply sufficient for the judge to infer that he had a fraudulent purpose of depriving his creditor of this security. This identical question was made and passed upon by the supreme court of Iowa in the case of *Bruley v. Rose*, 57 Iowa, 651. It was there decided: "A pledgee has a special property in the thing pledged, and a pledgor who takes the property from the pledgee's possession with the felonious design of depriving such pledgee of his security may be guilty of

larceny." In that case it appeared that Bruley had been charged with larceny of a span of horses which he had bought from Rose. For these horses Bruly was indebted to Rose in the sum of forty-five dollars and sixty cents, and to secure the payment of this balance it was claimed that Bruley delivered the horses to Rose as a pledge, and afterward gained possession of them under false pretenses, and with the felonious design of depriving him of his security. It appeared that Rose did give him permission to take the horses for a particular purpose. It was accordingly held that, if he took them for a fraudulent purpose, he was guilty of the offense of larceny.

⁷⁵⁴ Applying these principles to the facts in this case, we think the court did right in overruling the motion for a new trial.

Judgment affirmed.

All concurring, except Fish, J., absent.

LARCENY BY PLEDGOR.—A pledgor obtaining possession of the thing pledged by deception and false pretenses, and with the felonious intention of depriving the pledgee of his security, is guilty of larceny: See the monographic note to *State v. Homes*, 57 Am. Dec. 278.

ALMAND v. STATE.

[110 Georgia, 883.]

LARCENY BY BAILEE.—The crime of larceny after a trust can be shown only by proof that the bailee has made a fraudulent conversion to his own use of the thing intrusted to him. If there is no proof of positive fraud or intentional wrong on the part of the accused, there can be no conviction.

G. W. Gleaton, Arnold & Arnold, and J. F. Daniel, for the plaintiff in error.

C. D. Hill, solicitor general, and Rosser & Carter, for the state.

⁸³³ **LITTLE, J.** Almand was indicted for the offense of larceny after a trust delegated. The specific charge was, that he had been intrusted by the Gate City Oil Company with certain checks on banks in the city of Atlanta, at different times and for different amounts of money, for the purpose of using

the funds represented by said checks in purchasing and shipping cottonseed to the bailor. He was convicted, and moved for new trial on a number of grounds. Inasmuch as it is our opinion that the verdict was without evidence to support it, we do not find it necessary to consider and pass upon the other grounds of the motion. While the indictment charges that a number of checks described in that instrument were misappropriated, the state relied for conviction mainly on the appropriation to his own use by Almand of one certain check for the sum of two hundred and fifty dollars, dated November 29, 1898, which it was shown was delivered to the accused and disposed of by him in the county of Fulton. It appears from the brief of evidence ⁸⁸⁴ that Almand had been engaged in business with the Gate City Oil Company, in one way or another, for a number of years; that prior to the year 1898 he was due to that company a considerable amount of money for articles and merchandise furnished to him under an original agreement that such articles and merchandise were to be paid for in cottonseed at a certain price; that at various times during the year 1898 Almand received from the company and had cashed a number of checks which represented quite a large amount of money, for the purpose of buying cottonseed and shipping it to the company in Atlanta; that these checks were charged to him on the books of the company as they were delivered, as were other and different items of merchandise sold to him by the company, the whole account thus stated constituting an aggregate indebtedness for money advanced to purchase cottonseed and for merchandise previously sold to him by the company on credit; and that from time to time during the year the accused made shipments of cottonseed to the company in varying quantities. It also appears that during this period the accused was acting as the agent of the Marietta Guano Company in collecting notes which had been previously given by farmers in the purchase of fertilizers; that frequently the accused accepted payment for such notes in cottonseed which was shipped to the oil company, his plan of operation being, as we gather from the evidence, to ship cottonseed which he obtained by direct purchase, as well as by the collections which he made on the guano company's notes, directly to the oil company, without special regard to the amount of money furnished him by the company, his shipments sometimes exceeding in value the amounts of money furnished, and being sometimes less in value than such amounts. It was clearly shown that

when he received the particular check for two hundred and fifty dollars he at once went to the office of the guano company, some of whose notes he had collected in cottonseed shipped to the oil company, indorsed the check to such company, and received credit for the amount thereof on his personal indebtedness incurred by reason of the collection of its notes; and if his conviction be allowed to stand, it must rest on the fact of this misappropriation of the check intrusted to him. The indictment is founded on section 194 of the Penal ~~885~~ Code, which declares that: "If any person who has been intrusted by another with any money, check, or any other article or thing of value, for the purpose of applying the same for the use or benefit of the owner or person delivering it, shall fraudulently convert the same to his own use, he shall be punished," etc.

There can be no question that, under the evidence, the check was delivered to the accused for the purpose of purchasing cottonseed for the oil company, and it cannot be denied that this specific check was delivered by the accused to one of his creditors and went to pay a personal debt. It must be noted, however, that it takes more than this to constitute the offense with which the accused was charged. Undoubtedly, the check was technically converted from the use to which it was intended by the owner to have been put; but it is only when a fraudulent conversion has been made that a criminal offense is committed. If nothing more appeared but that the check was intrusted for the designated purpose and the bailee converted it to his own use, the conversion would be deemed fraudulent. But if the oil company had received in cottonseed the full value of the money which it had given to the accused with which to purchase the seed, how can it be said that its money was fraudulently converted? In other words, if the oil company gave the accused a given sum of money for the purpose of purchasing cottonseed for its use, and the accused, with his own or the money of some one else, purchased and shipped to it cottonseed of the full value of the money furnished, what difference can it make to the company whether the identical money which it delivered or the money of the accused paid for the seed? In any event it had, under the evidence, what it was entitled to demand from the accused in return for its money; and if in making these purchases the accused used his own money, or the money of some one else, and furnished the oil company all the seed which it could require of him, the fact that he used the

money, specifically given for the purchase, to reimburse himself or another for the sum which he had paid out for the benefit of the oil company cannot make any difference to that company. While such a proceeding might be a technical conversion, it could in no sense be a fraudulent ~~and~~ conversion. In the case of *Snell v. State*, 50 Ga. 222, this court, in construing the statute now under consideration, declared that, "to make out a case of larceny from the mere use of the article, it must appear that the use was fraudulent; that it was used under such circumstances as to show an intent to deprive the factor of his property." In the case of *Georgia R. R. v. Cubbedge*, 75 Ga. 324, this court said: "There is nothing in the proofs offered by the plaintiff which shows any positive fraud or intentional wrong on the part of defendants, and, without this, there is no embezzlement or larceny after a trust. The conversion must have been wrongful and fraudulent." In the case of *Etheridge v. State*, 78 Ga. 340, this court, in defining what was a fraudulent conversion in a case of larceny after trust, declared that it was "a deception deliberately practiced in order to gain an undue and unfair advantage." In his evidence, the president of the oil company, among other things, testified: "I cannot say that Mr. Almand appropriated one cent of that money to his own use." Again: "The cottonseed amounted to seven hundred and sixty-seven dollars and six cents. I don't know that the money for these checks did not go to pay for this cottonseed." And in testifying as to the amount of money represented by the checks set out in the bill of indictment, and the value of the cottonseed received from the accused, the president further testified: "We furnished him twelve hundred and seventy-five dollars, to buy cottonseed with, and he shipped us nineteen hundred dollars' worth of cottonseed." It may be true that on striking a balance the accused will be found indebted to the oil company; but, if this testimony for the prosecution be true, it cannot be held that the accused fraudulently converted to his own use any of the money which the oil company had intrusted to him with which to purchase cottonseed, because it shows that it received more seed than the money which it gave to the accused would buy. The criminal law is not concerned with the collection of the debt which the oil company holds against the accused. It will not lend its aid under any circumstances to collect this or any other debt. It is only for a violation of the laws of the state that the accused can be made to suffer punishment. If the oil company sold merchan-

dise to the accused on a credit, the law will aid it to collect ~~est~~ its debt, to the extent of giving it a judgment against the property of the defendant, but it will not extend to it the aid of its criminal laws to enforce a settlement. Inasmuch as the state entirely failed to show that the accused fraudulently converted the property of the oil company to his own use, the court below should have awarded a new trial. Refusal to do so was error, and the judgment is reversed.

All the justices concurring, except Fish, J., absent.

LARCENY BY BAILEE.—If a bailee converts property to his own use with felonious intent, he is guilty of larceny; but some act inconsistent with the bailment must be proved, and some courts hold that the felonious intent must exist when he acquires possession of the property: Monographic note to *State v. Homes*, 57 Am. Dec. 280, 281. See, too, *Pitsnogle v. Commonwealth*, 91 Va. 808, 50 Am. St. Rep. 867; note to *Commonwealth v. Lannan*, 25 Am. St. Rep. 632.

PAGE v. CITIZENS' BANKING COMPANY.

[111 Georgia, 73.]

PARTNERSHIP—LIABILITY FOR MALICIOUS PROSECUTION.—A partnership is liable in an action for malicious prosecution, united in by all the members for the purpose of furthering the interests of the partnership.

SLANDER.—A PARTNERSHIP is not liable for a slander uttered by one of its members, where the other partners did not direct the speaking of the words complained of.

MALICIOUS PROSECUTION—JOINDER OF DEFENDANTS.—Where a partnership, its individual members, and a third person conspire together to injure a plaintiff in instituting and carrying on a prosecution, all may be joined as defendants in an action for malicious prosecution.

PLEADING.—IN AN ACTION FOR MALICIOUS PROSECUTION AGAINST A PARTNERSHIP, THE COMPLAINT should allege that the prosecution was instituted and carried on in furtherance of the partnership's interests, and it is therefore proper to allege exactly in what way the partnership was involved in the matter which was the foundation of the prosecution.

MALICIOUS PROSECUTION.—A CRIMINAL PROSECUTION, to give rise to an action for malicious prosecution, must have been instituted without probable cause, maliciously carried on, and damage must have ensued therefrom.

MALICIOUS PROSECUTION.—A CRIMINAL PROSECUTION HAS BEEN "CARRIED ON," so as to support an action for malicious prosecution, where, under the authority of a search warrant, the premises of the person named therein are searched and

goods seized which are not described in the affidavit, and such person is arrested and carried before a magistrate, and after the prosecutor is allowed a reasonable time to secure evidence he fails to do so, and in open court announces that he cannot make out a case against the person arrested, and asks that an order be entered discharging the accused from custody and restoring to him the property wrongfully seized.

MALICIOUS PROSECUTION.—A CRIMINAL PROSECUTION IS AT AN END when the prosecution announces in open court that it has no evidence to offer against the accused, and procures an order dismissing the warrant and discharging the accused from custody, and no further action is ever taken.

PARTNERSHIP.—MALICIOUS ARREST and malicious prosecution are causes of action of a kindred nature. Hence, if a partnership is liable to be sued as such for a malicious prosecution, it will also be liable to be sued in the same manner under similar circumstances for a malicious arrest.

ACTIONS—JOINDER.—Causes of action for malicious prosecution, malicious arrest, and false imprisonment, all sounding in tort, may be joined in the same action when the plaintiff and defendants in each cause of action are identical.

FALSE IMPRISONMENT—ARREST UNDER WARRANT.—An imprisonment resulting from an arrest under a valid warrant is not a false imprisonment.

PRACTICE.—WHERE DEMURRERS ARE FILED to both the complaint and the answer, the proper practice is to consider the demurrer to the complaint first, and, if this is sustained, the demurrer to the answer need not be considered.

De Lacy & Bishop, for the plaintiff.

Roberts & Milner and W. M. Clements, for the defendants.

74 COBB, J. Page brought suit against Ashburn, Peacock, Edwards, Lietch, Williams, Rogers, and the Citizens' Banking Company of Eatonton, which was alleged to be a partnership composed of the five persons first above named. The petition contained three counts, one for malicious prosecution, one for malicious arrest, and one for false imprisonment. The facts alleged in each of the counts were, in substance, as follows: Rogers was the sheriff of the county, and as such had levied a mortgage execution 75 in favor of the Citizens' Banking Company against petitioner upon a certain stock of goods, which was in the possession of the sheriff under the levy at the former place of business of petitioner. Lietch and Rogers united in making an affidavit that "thirty-one suits of men's clothing have recently been taken from the storehouse occupied by J. D. Page and held in custody of J. C. Rogers, sheriff of Dodge county, Georgia, under levy of a mortgage fieri facias, and now occupied by W. H. Clements, and the same has been taken by criminal means and carried away, and that they believe, and

have probable cause to believe, that the said property is now concealed in the dwelling and premises occupied by J. D. Page, located on College street, in the town of Eastman." On this affidavit a warrant was issued, directing that the house and premises of Page be searched, and, if the property described in the affidavit be found therein, that he be arrested and, together with the property so found, brought before some judicial officer, to be dealt with as the law directs. It was distinctly alleged in the petition that when Lietch and Rogers made this affidavit they were acting for themselves, as well as for the Citizens' Banking Company, and with the approval and by the direction of each member of that partnership. The warrant issued on this affidavit was placed in the hands of the town marshal and county bailiff, and the house and premises of petitioner were thoroughly searched. None of the property described in the affidavit was found therein, but the officer seized three pieces of dress flannel and two suits of children's clothes, and arrested petitioner. Subsequently to the arrest, the bailiff, with other persons, returned and made another search of the premises, but found none of the property described in the affidavit. Petitioner was taken before a justice of the peace, when Lietch, Edwards, and Williams, acting for themselves and for the other members of the firm, appeared to prosecute plaintiff, with an attorney who was employed by the Citizens' Banking Company as a partnership and each and all of the members of the same. In pursuance of that employment such attorney did represent the prosecution against the plaintiff from its inception to its termination. Petitioner asked that he be released from custody, on the ground that the affidavit upon which the warrant was issued was defective and void and ⁷⁶ failed to charge any offense against him, and that for that reason his arrest and detention were unlawful. Lietch, Edwards, and Williams objected to the release of petitioner, and the magistrate refused to order his discharge. He then asked for an immediate investigation or preliminary trial, but the parties just referred to objected to this, and upon their application the hearing was continued to the next day. To avoid being placed in jail, petitioner offered to give a bond for his appearance, but the magistrate held that a bond must be given to appear and answer for the offense of larceny, and petitioner gave the bond to appear for a preliminary hearing on the next day for the offense of larceny.

At the time fixed for the preliminary trial, Rogers, Lietch, Edwards, and Williams, acting for themselves and with the approval of Ashburn and Peacock, the other members of the partnership, again appeared with their attorney before the magistrate for the purpose of prosecuting petitioner, and on their motion the case was again continued until the following day, over the objection of petitioner, who was present and demanding a hearing. At the time fixed in this last order of postponement, petitioner appeared with his counsel before the magistrate, and thereupon the prosecution, by their attorney, asked leave of the court to withdraw the warrant and to restore to petitioner the articles which had been seized by the officer who searched his house, the attorney representing the prosecution stating that it was impossible to make out a case. An order was then granted discharging petitioner from custody, and restoring to him the articles which had been seized. It was distinctly alleged that while Rogers and Lietch, the persons upon whose affidavit the warrant was issued, were the nominal prosecutors of petitioner, Ashburn, Edwards, Williams, and Peacock, and the Citizens' Banking Company as a partnership, were all jointly and severally the prosecutors in the case. Petitioner alleges that he was innocent of any offense, and that he did not take and carry away any of the articles named in the affidavit, nor were any of them concealed in his dwelling or about his premises, and that the prosecutors had no probable cause whatever to believe that the same were so concealed; that the articles seized by the officer constituted no part of the property mentioned in the affidavit, but were the property of petitioner, his wife and children, and had never been in the possession or custody of Rogers. Petitioner was in actual custody of the arresting officers for several hours, and was in their constructive custody for forty-three hours before he was released. It is alleged that the prosecution was maliciously instituted and carried on without probable cause, the prosecutors having no ground whatever for the proceeding, other than their desire to injure petitioner. As matter of aggravation and as evidence of malice, it is alleged that the defendants circulated disparaging and damaging reports about petitioner, charging that large quantities of goods stolen from the custody of the sheriff had been found by the officers in the house of petitioner, that he had a secret key to the store in which such goods were located, and that he had taken such goods.

To this petition the defendants filed demurrers, both general and special. The court sustained the demurrers and dismissed the petition, and this ruling is assigned as error. The plaintiff, during the progress of the hearing of the demurrers, offered an amendment to his petition, which merely set forth with greater particularity than the original petition the facts showing the connection of the Citizens' Banking Company with the mortgage execution which had been levied upon the property of petitioner, and prayed that, if it should be held that the suit could not be maintained against the Citizens' Banking Company as a partnership, the case might be held in court as a suit against Rogers and the individual members of that partnership. The court refused to allow this amendment, and this ruling is also assigned as error.

1. Is a partnership ever liable as such in an action for a malicious prosecution? If so, under what circumstances can such an action be maintained? One partner may be rendered liable for the acts of his copartner. Whether or not he is so liable is to be determined by the application of the rules governing the relation of principal and agent; and, generally, the partnership is liable for the act of one of the partners if it would have been liable had the same act been committed by an agent intrusted by the firm with the management of its business: 17 Am. & Eng. Ency. of Law, 1st ed., 1066. If a tort be committed by one partner while engaged in a transaction within the scope ⁷⁸ of the partnership business, and such tort be committed in furtherance of the interests of the partnership, it will be liable. But it will not be liable for a tort committed by one partner in a transaction outside of the partnership business, where he acts from his own private malice or ill-will, unless the act which constituted the tort was authorized by the members of the partnership or subsequently ratified by them, the act itself having been done in their behalf and interest: Mechem on the Elements of Partnership, secs. 204, 205; Parsons on Partnership, 4th ed., secs. 100, 102; 1 Bates on Partnership, sec. 461; 1 Lindley on Partnership, secs. 149, 150; 1 Jaggard on Torts, sec. 99; Barbour on Parties, 2d ed., c. 2, sec. 13, top p. 350. The authorities just cited established simply that as a partnership is an aggregation of individuals, where each one is the authorized agent of the others to perform any act within the scope of the partnership enterprise, if one of them, in the prosecution of the business of the partnership, be guilty of a willful wrong toward another, the other partners will be liable; and

that if one partner is guilty of an act outside of the partnership business, which causes an injury, the other partners will not be liable, unless it appear that such act was expressly authorized by them, or after the same had been performed in their behalf and interest they had either expressly ratified the same or knowingly received the fruits of the wrongful act. Applying these principles to the present case, the petition set forth a cause of action as against the individuals who compose the partnership known as the Citizens' Banking Company, and the plaintiff has a right to maintain the action, so far as the count for malicious prosecution is concerned, against the individuals composing that partnership. But the suit is not only against the individuals; it is against the partnership itself, and a judgment is sought against the partnership itself as well as against the individual members who compose it. It is well settled that a corporation is liable for torts committed by its agents, such as assault and battery, libel, malicious prosecution, and the like: *Behre v. National Cash Register Co.*, 100 Ga. 213, 62 Am. St. Rep. 320; 1 *Lawson's Rights, Remedies, and Practice*, sec. 367; *Newell on Malicious Prosecution*, sec. 102; *Columbus etc. Ry. Co. v. Christian*, 97 Ga. 56; *Georgia R. R. etc. Co. v. Richmond*, 98 Ga. 495. Whether a partnership can be sued as such and held liable for a tort in the commission of which ⁷⁹ all of the members united for the purpose of furthering the interests of the partnership, or whether in such a case the individuals only are liable to be sued, either jointly or severally, is a question which is for the first time presented to this court for decision. Can a partnership itself be regarded as being so separate and distinct from the individual members of the same that it may be treated as the wrongdoer, and a judgment be rendered against it which would bind partnership assets in the same manner that a judgment rendered against it on a contract would bind such assets?

A corporation is a person, and therefore it is clear that the decisions uniformly holding that it may be rendered liable for a tort committed by its agent are undoubtedly sound. "Though a firm or partnership is not a person, it is a legal entity, and, for some purposes, is recognized as a quasi person having powers and functions exercisable by one of the partners severally or all of them jointly": *Drucker v. Wellhouse*, 82 Ga. 129. In the opinion in the case just cited, Mr. Chief Justice Bleckley says: "A firm adds nothing to population, and in this respect is unlike a corporation, which augments population in the legal, though not in the natural, world. Still, the law does take

note, on a wide scale, of partnership as a legal entity, and regards it as a unit both of rights and obligations. Judgment may be entered and execution issue for or against it: Code, secs. 1899, 3576; Civ. Code, secs. 2638, 5346. Attachment may issue against it as nonresident: *Chambers v. Sloan*, 19 Ga. 84; *De Leon v. Heller*, 77 Ga. 740; or as absconding: *Hines v. Kimball*, 47 Ga. 587. It may be served with process: *Peel v. Bryson*, 72 Ga. 332. It may be taxed: *Mayor v. Hines*, 53 Ga. 616; and see many provisions in the session laws imposing taxes. It may be insolvent: Code, sec. 1918; Civ. Code, sec. 2660; *Bennett v. Woolfolk*, 15 Ga. 213; *Daniel v. Townsend*, 21 Ga. 155; *Pullen v. Whitfield*, 55 Ga. 174; *Anderson v. Pollard*, 62 Ga. 51. It may assign its property to pay its creditors, but whether by general law a single partner can make for it a general assignment seems open to question: *Burrill on Assignments*, sec. 67 et seq.; *Story on Partnership*, secs. 101, 310; *Parsons on Partnership*, 165, 166, 400. As to restrictions on limited partnerships in the matter of assignments, see Code, secs. 1939, 1940; Civ. Code, ⁸⁰ secs. 2681, 2682. According to *Parsons on Partnership*, 449, there is a 'general tendency of the law at this day to complete its recognition of a partnership as a body of itself, with its own means appointed to its own debts.' In view of this tendency, which is everywhere traceable, and no less in our own local system than elsewhere, we may safely hold that though a firm or partnership is impersonal or nonpersonal, it is for some purposes, in contemplation of law, a quasi person, having powers and functions exercisable by one of the partners severally or all of them jointly. That it may be a debtor or a creditor within the meaning of modern statutory enactments we have no question." In that case it was held that an insolvent firm might make an assignment as an insolvent debtor, though the partners themselves as individuals might be solvent: See, also, *Green v. Willingham*, 100 Ga. 224. If a partnership may be considered as a entity so as to be subjected to suit as such in the cases referred to in the decision from which the above quotation is made, we do not see why, upon principle, a partnership might not be treated as an entity and suable as such by one who had been the subject of a wrong committed by the concurrent action of all the members of the partnership, in the prosecution of a transaction instituted and carried on for the purpose of punishing one who was charged with despoiling the partnership of its property, as well as for the purpose of recovering property which was owned by the partnership. Such is the case made by

that count in the petition which seeks damages for the malicious prosecution which it is distinctly alleged was instituted and carried on by the direct authority of each and every member of the partnership acting both in their individual capacities and as members of the firm.

It has been held that if one partner maliciously prosecutes a person for stealing partnership property, the firm is not answerable, unless all the members are in fact privy to the malicious prosecution: *Arbuckle v. Taylor*, 3 Dowl. 160, cited in *Newell on Malicious Prosecution*, sec. 103. It would seem to follow from this ruling that if all of the members united in instituting and carrying on the prosecution, the firm would be answerable; and such are the allegations in the present case. In nearly all of the cases where it is sought to hold the partnership liable for a ^{§1} tort, upon examination of the facts it will be found that the suit was not against the partnership as such, but was against one or more members thereof sued severally or jointly, as the case may be: See *Durant v. Rogers*, 87 Ill. 508; *Rosenkrans v. Barker*, 115 Ill. 331, 56 Am. Rep. 169; *Farrell v. Friedlander*, 63 Hun, 254; 18 N. Y. Supp. 215; *United States v. Thomasson*, 4 Biss. 99. In some of the cases just cited it was ruled that under the facts of the case the partnership was liable, and in others that it was not. Attention is called to them for the purpose, as above indicated, of showing that they are not authority either way on the proposition as to whether a partnership can be sued as such for a tort. In *Schwabacker v. Riddle*, 84 Ill. 517, it was held: "Partners are liable in solido for the torts of one, if committed by him as a partner and in the course of the business of the partnership." A ruling in almost identical language was made in *McIlroy v. Adams*, 32 Ark. 315. Upon examination of these cases it will be found that the suit in each instance was against the individuals and not against the partnership. In *Matter of Ketchum*, 1 Fed. Rep. 815, it was held that a firm was liable if one of its members converted to the use of the firm the property of another, and that it was immaterial whether the other members of the firm were ignorant of the wrong or innocent of any wrongful intent. There was in that case, however, no ruling as to how a suit for such wrongful conversion should be brought, whether against the partnership as such or against the individuals composing the same. The only cases to which our attention has been called in which the partnership as such was sued for a tort are the cases of *Marks v. Hastings*, 101 Ala. 165, and *Kirk v. Garrett*, 84 Md. 383. In the former it

was held: "A partner is not liable for a malicious prosecution instituted by his copartner on a charge of larceny of partnership property, unless he advises or directs it, or participates therein, and then only in his individual capacity." In the latter case, it was held that under the facts of that case the firm was not liable, but the judge who wrote the opinion recognized that there were cases in which it might be held liable for the torts of its members: *Kirk v. Garrett*, 84 Md. 410. While the prosecution of a person for a criminal offense might not be within the scope of a mercantile partnership, even though such offense consisted ⁸² of a larceny of the partnership property, as was held in the Alabama case, *supra*, still it would seem that any proceeding authorized by law for the purpose of reclaiming property of the partnership which had been stolen would be within the scope of the partnership business, and each partner would be authorized to use such remedies as the law gave for that purpose; and if these remedies were pursued maliciously and without probable cause and a prosecution for a public offense resulted therefrom, the partnership as such would be liable in an action of malicious prosecution. But be this as it may, it is not necessary for us to decide this question in the present case, for the allegations of the petition are clear and distinct that every act that was done by the partner who sued out the search warrant was authorized and directed by each and every other member of the firm acting in behalf of the partnership. Treating the partnership as a legal entity and as a quasi person, as we are not only authorized but bound to do, following the decision in *Drucker v. Wellhouse*, 82 Ga. 129, we have no hesitancy in holding that under the allegations of the petition an action for malicious prosecution was maintainable against the Citizens' Banking Company as a partnership, and that the plaintiff is entitled under his allegations to recover a judgment which will bind partnership assets.

While the decision in the case of *Ozborn v. Woolworth*, 106 Ga. 459, is apparently in conflict with what is now ruled, upon a close examination of that case it will be found that it was upon its facts correctly decided, and when it is thus confined it is not only not in conflict with the present ruling but is rather in line therewith. In that case it was sought to hold a partnership liable for slanderous words uttered by one of the partners, upon two grounds: 1. Because the words were uttered in a transaction within the scope of the partnership business; and 2. That the other partner after the slanderous words

were uttered had ratified the same. It was properly held that the partnership was not liable upon either ground. If a corporation is not liable for a slander uttered by its agent, although in a transaction within the scope of his agency, unless the corporation directed the speaking of the very words complained of, as was held in *Behre v. National Cash Register Co.*, 100 Ga. 213, 62 Am. St. Rep. 320, it would seem upon principle that a partnership would not be liable for a slander uttered by one of its agents, even though that agent be a member of the firm, unless all the partners directed the speaking of the very words complained of. The action was, therefore, not maintainable upon the first ground. While one may render himself liable by ratifying the tort of another, such liability arises only where the original act was done in the interest and intended to further some purpose of the person who ratifies the act of the wrongdoer; as in a case where property of which the ratifier is the owner is seized and thus passes into the possession of the real owner, or where one in behalf of another, without authority, seizes property in which the other has no interest, and the person in whose interest the seizure was made receives the property thus seized: See *Cooley on Torts*, 2d ed., 146. It is hard to conceive how this principle can apply to a slander. Uttering without authority a slander in the interest of another, and approving or ratifying such slander for the reason it was so uttered or because of a benefit supposed to arise from the wrongful act, are transactions which, if at all possible, are beyond legal comprehension. Even if a slander can, in contemplation of law, be uttered without authority in the interest of another, or if a benefit can be received from a slander uttered in one's behalf, such interest or benefit would generally, if not in every case, be so remote that a legal investigation should not be entered into for the purpose of connecting the interest or benefit with the slander. The headnote and the language of Presiding Justice Lumpkin in the opinion in *Ozborn v. Woolworth*, 106 Ga. 459, must be taken in the light of the questions then under consideration, and there was nothing in that case to call for a ruling on the question whether a partnership would be liable for a tort committed by one of its members under the direction and express authority of all the members.

2. As it was distinctly alleged in the petition that the partnership, the individual members thereof, and Rogers, the sheriff, confederated and conspired together for the purpose of injuring the plaintiff in instituting and carrying on the prosecu-

tion which was the foundation of the action, there was no merit in a demurrer that there was a misjoinder of parties defendant: *Cheney v. Powell*, 88 Ga. 629, 634.

⁸⁴ 3. It was not only proper, but in the present case it was necessary, so far as the liability of the partnership was concerned, that the plaintiff should allege that the prosecution was instituted and carried on in furtherance of the partnership's interests, and it was therefore proper that the plaintiff should allege exactly in what way the partnership was involved in the matter which was the foundation of the prosecution. Those portions of the original petition relating to the manner in which the partnership was interested in the prosecution were not subject to the special demurrers filed to the same, and the amendment which was rejected should have been allowed in so far as it related to this matter.

4. Before a criminal prosecution will give rise to a cause of action in favor of the person prosecuted against the prosecutor, it must not only appear that the prosecution was without probable cause and that damage ensued therefrom, but it must also appear that the prosecution was maliciously carried on. In *Swift v. Witchard*, 103 Ga. 193, it was held that before a criminal prosecution will be actionable there must at least have been an arrest and an inquiry before a committing court. The code declares that an inquiry before a committing court or justice of the peace amounts to a prosecution: Civ. Code, sec. 3849. Where a search warrant is issued and under authority of the same the premises of the person named therein are searched and goods seized which are not described in the affidavit, and the person named therein is arrested and carried before a justice of the peace, and after the prosecutor is allowed a reasonable time to secure evidence he fails to do so, and in open court announces that the prosecution cannot make out a case of larceny or receiving stolen goods against the person arrested, and asks that an order be entered discharging the accused from custody and restoring to him the property wrongfully seized, a prosecution has been "carried on" within the meaning of the statute, and, if the same is malicious and without probable cause, will give the person prosecuted a right of action against those who instituted and carried it on. Especially would this be true where the hearing was continued from day to day, and pending the same the accused was compelled, in order to obtain his ⁸⁵ liberty, to give a bond for his appearance before the magistrate to answer the charge of larceny.

5. The code provides that the prosecution must be ended before the right of action accrues: Civ. Code, sec. 3850. When the attorney representing the prosecution announced in open court that they had no evidence to offer against the accused, and procured an order dismissing the warrant and discharging the accused from custody, and no further action was ever taken thereon, the prosecution was at an end within the meaning of the law: See, in this connection, *Woodruff v. Woodruff*, 22 Ga. 237; *Horn v. Sims*, 92 Ga. 421. The ruling in *Hartshorn v. Smith*, 104 Ga. 235, does not conflict with this. It was there held that, though one arrested upon a criminal warrant be discharged, the prosecution would not be at an end if the prosecutor with due diligence follow up and carry on the prosecution in a court having jurisdiction to try the case upon its merits; this, in effect, being a continuation of the criminal prosecution. In the present case no further action was taken by the prosecutors after the warrant was dismissed by the magistrate.

6. If a partnership is liable to be sued as such for a malicious prosecution, it will also be liable to be sued in the same manner under similar circumstances for a malicious arrest, as the two causes of action are of a kindred nature. Causes of action for malicious prosecution, malicious arrest, and false imprisonment, all sounding in tort, may be joined in the same action when the plaintiff and defendants in each cause of action thus joined are identical: Civ. Code, sec. 4944.

7. The warrant upon which the accused was arrested was neither defective nor void. The affidavit complied with the law which declares that a search warrant shall not issue except upon probable cause, supported by oath, particularly describing the place or places to be searched and the person or things to be seized: Pen. Code, sec. 1243 et seq. Such being the case, the imprisonment resulting from an arrest under a warrant thus issued was not a false imprisonment. In *Joiner v. Ocean S. S. Co.*, 86 Ga. 238, it was held that "where a warrant is regularly and properly sued out, and the prisoner has been properly and legally arrested under it, the imprisonment cannot be false." In the opinion Mr. Justice Blandford ⁸⁶ says: "Where the arrest is by valid process regularly sued out, action for malicious prosecution is the only remedy": Citing *Melson v. Dickson*, 63 Ga. 682, 36 Am. Rep. 128; *Riley v. Johnston*, 13 Ga. 260; *Sewell v. State*, 61 Ga. 496. "It is a rule of law in this connection which admits of no exception, that where there is an arrest on a valid warrant—one neither void nor void-

able—it is not a false imprisonment, and no liability is incurred by any person whomsoever, whether immediately or only remotely connected therewith. And the rule applies, no matter how corrupt or unfounded or mistaken the motives which induced the issuance or execution of the warrant may have been": 12 Am. & Eng. Ency. of Law, 2d ed., 739, 740, and cases there cited. The ruling in 86 Georgia, supra, does not in any manner conflict with the decision in Thorpe v. Wray, 68 Ga. 359. While the headnote in the latter case says that the unlawful detention of another, though under a warrant, will give a right of action, if done in bad faith, an examination of the facts of the case and the opinion will show that the decision was placed upon the distinct ground that the warrant was void. Even in a case where the warrant is defective or void, the imprisonment thereunder would not give rise to an action for false imprisonment, if the party suing out the warrant acted in good faith, and the officer executing the same acted in like manner: Civ. Code, sec. 3852. The court below committed no error in sustaining the demurrer to the petition, so far as the count which claimed damages for false imprisonment was concerned.

8. Error is assigned in the bill of exceptions upon the refusal of the court to strike the answer of the defendants. No ruling will be now made on the question as to whether the answer set up a sufficient defense to the action. If the court below passed upon this question at all, it was in an irregular way. It must have passed on the question either before considering the demurrers to the petition, which would have been irregular, or he must have heard demurrers to the answer after the petition was dismissed, which would have been without authority. When the petition was dismissed the whole case went out, and there was nothing left to answer. In either view, the question is not properly before this court for decision. The proper practice, where there are demurrers filed to both the petition and ⁸⁷ the answer, is to first consider the demurrer to the petition; if this is sustained, the demurrer to the answer need not be considered. Direction will be given that all questions relating to the sufficiency of the answer be left open until another hearing.

9. The court erred in sustaining the demurrers so far as the counts for malicious prosecution and malicious arrest were concerned. These counts were not subject to any of the objections set up in the demurrers thereto, either general or special. There was no error in sustaining the demurrers to the count for false imprisonment. Direction will be given that the case be

reinstated as to the counts for malicious prosecution and malicious arrest, and that the count for false imprisonment stand as stricken.

Judgment reversed, with direction.

All the justices concurring, except Fish, J., absent.

TO CONSTITUTE A PROSECUTION MALICIOUS, for which a civil action may be maintained, it must have been prosecuted with malice, without probable cause, and have terminated in acquittal or discharge: See the monographic note to *Ross v. Hixon*, 26 Am. St. Rep. 128.

A MALICIOUS PROSECUTION IS TERMINATED, in the sense that a civil action will lie therefor, by the failure of the prosecutor to appear or by entry of dismissal. Any mode by which the prosecution may be dismissed or ended, though without trial, is sufficient: See the monographic note to *Ross v. Hixon*, 26 Am. St. Rep. 135-137.

IF ONE PARTNER MALICIOUSLY PROSECUTES an action in relation to the firm property, his copartners are not liable therefor unless they are privy to such prosecution: See the extended notes to *Williams v. Hendricks*, 67 Am. St. Rep. 40; *Tryon v. Pingree*, 67 Am. St. Rep. 413; *Ross v. Hixon*, 26 Am. St. Rep. 133.

A PARTNERSHIP IS ANSWERABLE FOR SLANDER or libel committed by one of its members in the course of the firm business: See the extended note to *Williams v. Hendricks*, 67 Am. St. Rep. 39.

FALSE IMPRISONMENT.—IT IS A DEFENSE to an action for false imprisonment that the arrest was under lawful and valid process: See the monographic note to *Tryon v. Pingree*, 67 Am. St. Rep. 412.

BRADLEY v. STATE.

[111 Georgia, 168.]

CONTEMPT.—THE POWER to punish for contempts is inherent in every court of justice.

CONTEMPT — POWER OF COURTS — LEGISLATIVE ABRIDGMENT.—Where a court is established by the constitution, the legislature has no right, without express constitutional authority, by defining what are contempts, to limit such court to treating as contempts such acts only as are embraced in the legislative definition.

CONTEMPT—POWER OF LEGISLATURE.—A CONSTITUTIONAL PROVISION which says that "the power of the courts to punish for contempts shall be limited by legislative acts," empowers the legislature simply to fix the limit of the punishment which the courts could inflict for contempts, and does not authorize such body to limit the inherent power of courts to decide what are contempts and to punish for contempts. Hence, an act which seeks to limit the jurisdiction of a constitutional court to punish contempts to certain specified acts is not binding on such courts.

CONTEMPT—POWER OF COURT—INDICTABLE OFFENSE.—That a given act is indictable under the penal laws of a state does not deprive a court of the power of punishing such act as a contempt.

Information for contempt, charging that the defendant improperly and corruptly approached one of the attorneys engaged in the trial of the case of *Malone v. Adams*, and stated in substance that a member of the jury could be approached and illegally influenced in obtaining a verdict, or a mistrial, and offered, directly or by intimation, to approach such juror or have it done, and corruptly influence the juror in order to obtain a verdict or mistrial.

King & Anderson, Lewis W. Thomas, Rosser & Carter, and J. H. Porter, for the plaintiffs in error.

C. D. Hill, solicitor general, contra.

¹⁶⁰ **SIMMONS, C. J.** Information under oath was filed before the judge of the superior court of the Atlanta circuit, charging Bradley and Looney with contempt of court. The specifications of the charges will be found in the official report. Neither Bradley nor Looney was an officer or juror of the court or connected with the case on trial. Both filed demurrers on the grounds that the facts set out did not show that they were guilty of any contempt of court; that the allegations did not show that the contempt, if any was committed, was in the presence ¹⁷⁰ of the court or so near thereto as to obstruct the administration of justice; and that, if the facts alleged were true, they were liable to be indicted for the violation of a criminal statute. These were, in substance, the grounds of demurrer argued before this court. The court overruled the demurrers; trials were had, Bradley and Looney were adjudged in contempt, and both fines and imprisonment were imposed. To this judgment and sentence, and to the overruling of their demurrers, Bradley and Looney excepted. A separate information was filed against each, and they were tried separately, but the cases were argued together here, and we will treat them together, as they present the same questions.

The power to punish for contempts is inherent in every court of justice. It is absolutely necessary that a court should possess this power in order that it may carry on the administration of justice and preserve order and decorum in the court. As far as we can ascertain, this power has existed since courts were first established. Judge Wilmot, in 1795, in a treatise up-

on the subject, said he had been unable to find where it was first exercised, but in his opinion it was as old as the courts themselves. All the courts, in their decisions, and all the text-writers lay down the same doctrine—that this power is necessary to all courts and is inherent in them. It is so well established that we deem it unnecessary to cite authorities upon the subject. This power being inherent and necessary, can the legislature, by defining what are contempts, limit the courts to treating as contempts such acts only as are embraced in the legislative definition? In the formation of our government, federal and state, the three departments of government were in each constitution ordained to be separate, distinct, and independent of each other. No one of them had any right or power to infringe upon the power or jurisdiction of the other, without an express constitutional provision granting this right or power. The legislature cannot take away, restrict, or modify any of the powers conferred by the constitution upon the executive. Nor can the executive infringe upon the powers of the legislature. Nor can either the legislature or executive abridge the powers conferred by the constitution upon the courts, unless express authority is given. Each of these departments represents the sovereignty ¹⁷¹ of the people. Indeed, the executive, the legislature, and the judiciary are but the servants and agents of the people. To each department the people have given certain powers, and have declared that neither of the other departments shall interfere therewith. The people have intrusted these servants or agents with the duty of carrying out their will, and for that purpose, in one of these departments, they have by their organic law established certain courts. Among these are the superior courts. When these courts were established by the constitution, they were established with all the rights and powers possessed by all courts of record prior to that time. Among these powers was that of defining and punishing contempts of court, whether such contempts were direct, that is, committed in the presence of the court, or constructive, interfering indirectly with the administration of justice. This power was incident to the court itself and belonged, not to the judges as individuals, but to the court. The courts established by the constitution were established by the people and represented the majesty of the people. Whoever disobeyed an order of such a court, or was in contempt of its proceedings, or did anything which tended to impede or corrupt the administration of justice committed a contempt against the majesty of the peo-

pla. Without power and ability to preserve order and decorum, to preserve the purity of jury trial and to enforce their own orders, and the like, courts could not carry out the wishes of the people. The courts established by the constitution were therefore vested with all these necessary powers—powers which were at common law possessed by all courts of record. Whatever a court of record could, under the common law, punish as a contempt, these courts had power to deal with as a contempt. This power came to them as much as did the common law. Indeed, it is a part of the common law: 1 Bailey on Jurisprudence, sec. 297. When the constitutional convention established our courts, it vested in them all the power necessary to carry out the purposes for which they were designed. Such a court, established with such powers, is not, in the exercise of these powers, subject to legislative control. The superior court is a constitutional court, established with these powers, and the legislature has no right, without express constitutional authority, to abridge, restrict, or modify either its jurisdiction ¹⁷² or its powers: 1 Bailey on Jurisprudence, sec. 397; State v. Morrill, 16 Ark. 384; Carter v. Commonwealth, 96 Va. 791; Ex parte Robinson, 19 Wall. 505; 7 Am. & Eng. Ency. of Law, 2d ed., 33, and cases cited.

These points were conceded by the able and learned counsel who argued these cases here; but they claimed that the constitution of this state had granted to the legislature the express power to define what are contempts, to classify them, and to take away from the courts jurisdiction to punish as contempts any act not mentioned in the statute which is now codified as section 4046 of the Civil Code. Paragraph 20 of section 1 of article 1 of the constitution of our state (Civ. Code, sec. 5717), in the bill of rights, says: "The power of the courts to punish for contempts shall be limited by legislative acts." We think that neither a literal nor a liberal construction of this paragraph can make it mean what counsel for the plaintiffs in error insisted it did mean. The word "power," used in this connection and as applied to courts, means "the right, ability, or faculty of doing something": Bouvier's Law Dictionary, 2d ed., tit. "Power"; it is "the ability to act, regarded as latent or inherent; the faculty of doing or performing something; capacity for action or performance": Webster's Dictionary. The word "punish" is defined by Webster to mean "to impose a penalty upon; to afflict with pain, loss, or suffering for a crime or fault; . . . to inflict a penalty for [an offense] upon the of-

fender"; and by Anderson, "to impose a penalty for the commission of a crime." Giving to these two words their ordinary and usual meaning, the paragraph would read as follows: The right or authority of the courts to impose penalties or inflict punishment for contempts shall be restricted by legislative acts. If the framers of the constitution had desired that the legislature should classify and define contempts of court, they would certainly have put in this paragraph, or in some other, words expressly giving the legislature power to do so. Had they said that the legislature should have power to define what are contempts, there could be no possible doubt upon the subject. Many illustrations could be given of where constitutions give to the legislature power to define offenses and to fix the punishment for the same, but we think that nothing of the sort in regard to contempts ¹⁷³ is contained in our constitution. Where a court is established by the constitution, it is given all the powers usually possessed by all courts, and we will not construe another provision of the constitution so as to take away from the court a power which is essential to its preservation and to its accomplishment of the purposes for which it is created, unless constrained to do so by express words or necessary implication.

The power to limit the punishment of contempts was first given the legislature by the constitution of 1861. The chairman of the committee on the revision of the constitution in that convention was T. R. R. Cobb, who, in my opinion, was the greatest lawyer this state has ever produced, and who had, I think, no superior in any other state. His codification of the common law, of equitable principles, of the statutes of this state, and of the decisions of this court, will stand as a monument to his great learning, research, and ability as long as our system of laws prevails. Being chairman of the committee which reported the constitution of 1861, he doubtless drafted the paragraph now under consideration. He was not only a great lawyer, but a scholar as well, and must certainly have known the meaning of the words used and what would be their effect, and must have used them with reference to their ordinary meaning as defined by lexicographers. Taking these words in this sense, it is clear to us that the only power given to the legislature was the power to fix the limit of the punishment which the courts could inflict for contempts. Before that time, courts were not restricted in punishing contempts to any certain sum or to any certain period of imprisonment. Knowing

the fallibility of human nature, and perhaps believing from his experience and practice in the courts that a judge sometimes took a contempt as personal, rather than as a contempt of his authority or office, and punished it too severely, and knowing also that the legislature would have no power, without a constitutional provision, to control the judge in this matter, Mr. Cobb doubtless inserted this provision in order to give the legislature power to restrict and limit the amount or quantum of punishment which could be inflicted. We are strengthened in this view by certain provisions inserted by Mr. Cobb in his codification of the laws of the state. From a diligent search ¹⁷⁴ of the statutes in force prior to 1861 we can find no act of the legislature which attempted to restrict the amount of punishment to be imposed for contempts of court, the only hint at it being in the judiciary act of 1799, which prescribed the practice in summoning jurors and declared they should be fined three hundred dollars for nonappearance. When Mr. Cobb came to codify the laws of the state, he knew that there was no act limiting the punishment for contempt, and we first find a limitation upon the amount of such punishment in the code of 1863. In that code were sections limiting the amount of punishment for contempts in the supreme and superior courts and courts of ordinary. These sections were doubtless inserted by him to carry out the provisions of the paragraph of the bill of rights, quoted above. They limit the punishment for contempt by prescribing the maximum of fine or imprisonment which could be imposed. They apparently show Mr. Cobb's construction of the constitutional provision, and they have been adopted and incorporated in all succeeding codes of this state.

If these views are correct, it follows as a necessary consequence that constitutional courts are not, in dealing with contempts, restricted exclusively to the acts specified in section 4046 of the Civil Code, and that the legislature had no power, so far as these courts were concerned, to take away the inherent power to punish for contempt. Such a court may still "go beyond the provisions of the statute in order to preserve and enforce its constitutional powers by treating as contempts acts which clearly invade them": *Rapalje on Contempts*, sec. 11. Tampering with a juror or officer of court, corrupting or attempting to corrupt him, bribing or attempting to bribe him, are held by all courts to be contempts. Nor does it make any difference that the same act is indictable under the penal laws

of the state. On this subject Judge Seymour D. Thompson, in an admirable article in 5 Criminal Law Magazine, says (page 155): "The power of the courts in this regard being founded in the principle of self-preservation, it does not at all go to deprive them of it that the law has provided some other mode for punishing the offender; it is quite immaterial that the offense is indictable. Courts are not obliged to trust the preservation of their dignity and authority to such weak agencies as information, indictment, and ¹⁷⁵ trial by jury, it may be, before some other tribunal where the success of the prosecution and the conviction of the offender may depend upon the zeal of a prosecuting witness, or the state's attorney, or upon circumstances purely accidental. Besides, the exigencies may not admit of so tardy a remedy": See the authorities cited in the footnote, and see, also, 2 Bishop's New Criminal Law, sec. 264. On the general subject of contempts and the power of the legislature to regulate their punishment, see an admirable treatise by Judge Bailey in his work on Jurisdiction, volume 1, section 287 et seq.

In the argument of this case, counsel cited many decisions of the United States courts, construing the act of Congress of March, 1831, of which section 4046 of our Civil Code is substantially a copy. These decisions simply hold that the circuit and district courts, being the mere creatures of Congress, are bound by the act of Congress defining what contempts shall be punishable. Judge Field, in *Ex parte Robinson*, 19 Wall. 505, puts his decision on that ground, and virtually holds that the supreme court of the United States, being a constitutional court, would not be bound by the act. So while in this state courts created by the legislature are bound by section 4046 of the Civil Code, our superior courts, being created by the constitution and having the inherent power to decide what are contempts and to punish for contempts, cannot be controlled in this respect by the legislature. The latter has no more power to abridge, restrict, or modify the jurisdiction of the superior courts over contempts than it has to abridge their jurisdiction over matters conferred upon them exclusively by the constitution, such as the trial of title to land and the like. The constitutional provision giving the legislature power to limit the power to punish for contempts does not authorize it to define or classify contempts, but only to fix the maximum amount of punishment to be imposed after the contempt has been adjudicated.

Judgment in each case affirmed.

All the justices concurring.

CONTEMPT.—THE RIGHT TO PUNISH FOR CONTEMPT is an inherent power of courts: In re Knaup, 144 Mo. 653, 66 Am. St. Rep. 435. It may be regulated, but not taken away, by the legislature: In re Robinson, 117 N. C. 533, 53 Am. St. Rep. 596. A court created by the constitution has inherent power to punish for contempt, which the legislature is not competent to abridge: Hale v. State, 55 Ohio St. 210, 60 Am. St. Rep. 691.

CONTEMPT.—IF AN ACT IS A CRIME, as well as a contempt, it may be punished as a crime, notwithstanding the punishment for contempt: Note to In re Nickell, 27 Am. St. Rep. 319. But when the party is cited for contempt, he cannot be compelled as a witness to prove the contempt, and thus incriminate himself as to the crime: In re Nickell, 47 Kan. 734, 27 Am. St. Rep. 315.

FLETCHER v. AMERICAN TRUST AND BANKING CO.

[111 Georgia, 300.]

EXECUTORS AND ADMINISTRATORS—POWER TO BORROW MONEY AND MORTGAGE LAND.—Under a will giving an executor power, should it be necessary, to raise money in such way as seemed best to him for the payment of debts, the executor has power to borrow money and to secure the debt by a deed or mortgage.

EXECUTORS AND ADMINISTRATORS—BORROWING MONEY IN EXCESS OF DEBTS.—While an executor with authority to borrow money for the payment of debts has no power to borrow more than the amount of the debts, yet a lender has the right to presume that this power was properly exercised, and need not inquire into the amount of the debts, and if he loans more than the amount of the debts and the contract is free from fraud and collusion, the estate is bound.

EXECUTORS AND ADMINISTRATORS—BORROWING MONEY—ATTORNEYS' FEES.—An executor, having power under a will to raise money for the payment of debts in such manner as seems best to him, has authority to contract for the payment of attorneys' fees if the note given for the payment of money borrowed has to be collected by suit.

P. F. Smith and R. R. Shropshire, for the plaintiff in error.

W. D. Ellis and Gray, Brown & Randolph, contra.

²⁰¹ SIMMONS, C. J. In August, 1892, Mrs. Fletcher made and executed a will. She died, and the will was probated in October of the same year. In her will she appointed her husband, A. A. Fletcher, her executor. The first item of the will was as follows: "I desire that all my debts, should I owe any, be paid as soon as practicable by my executor after my death. He is authorized to use any money that I may leave for this purpose, or, should it be necessary, to raise a sufficient amount of money for this purpose in such way as seems best to him." By another item of the will, the executor was given general power and control of the estate, with full authority to invest funds, change investments, make new investments, sell property, and buy other property. He was not to be required to make any inventory of the estate or to make returns as executor, and he was authorized to execute any of the powers conferred "without order of court and privately, without publication or public sale, and as to him seems best for the beneficiaries." Fletcher qualified as executor, and, as such, applied to the American Trust and Banking Company for a loan of money with which to pay off the debts of the estate, representing to the officers of the company that the debts amounted to four thousand seven hundred dollars. The company, on February 16, 1894, loaned him the money, taking his note, as executor, for four thousand seven hundred dollars, due February 16, 1899, and also a number of coupon interest notes, with agreement that upon a failure to pay any of these interest notes upon maturity the entire indebtedness should become at once due. The notes also stipulated for the payment of ten per cent attorneys' fees in the event the notes had to be collected by suit. To secure these notes the executor, as such, executed a deed to certain land in the city of Atlanta. The interest note falling due in August, 1897, was not paid at maturity, and, in February, 1898, suit was brought in the city court of Atlanta, against the executor, upon the principal note and upon the unpaid interest notes. The plaintiff prayed a general judgment against the executor, binding the estate, for ³⁰² a special lien upon the land conveyed by the security deed, and for attorneys' fees. The executor, answering the petition, admitted the execution of the notes and deed, but denied that the estate of his testatrix was liable for the debt. He claimed that the debt was his individual debt, and that the plaintiff had no right to a special lien on the land or to a judgment against the estate for attorneys' fees. The case was submitted to the trial judge without a

jury, and he passed upon all questions, both of law and of fact. The executor, in his testimony, admitted borrowing the four thousand seven hundred dollars from the plaintiff, but testified that when he obtained the money the estate owed but three thousand four hundred dollars. One of the officers of the company testified that the executor represented to him, when the money was loaned, that the estate owed debts to the amount of four thousand seven hundred dollars. The court rendered judgment against the estate for the principal, interest, attorneys' fees, and costs, and set up the special lien on the land. The executor moved for a new trial, the motion was overruled, and the executor excepted.

Three questions are involved in this case: 1. Did the executor have power under the will to borrow money and secure the debt by deed or mortgage? 2. Having such power, could he borrow more than the amount of the debts of the testatrix, so as to make the contract binding upon the estate, not only to the amount of the debts, but to the full amount borrowed by him? 3. Was he authorized to contract for the payment of attorneys' fees in the event it should be necessary to collect the debt by suit? We have no doubt that all these questions may be answered in the affirmative, under the rules governing the power given the executor by this will.

1. The will is clear and explicit that the executor had power, in case it was necessary, to raise money, in such way as seemed best to him, for the purpose of paying the debts of his testatrix. When the executor, in the administration of the assets of the estate, ascertained that it was necessary to raise money to pay the debts of the estate, he had full power to do so. It is a well-recognized principle of law, that where power is given to raise or borrow money, the power to secure the loan is necessarily implied. The will having given power to the executor to raise money to pay the debts of the estate, he had also the power to secure the loan by deed or mortgage. Otherwise, he might ³⁰³ have been unable to successfully execute the power expressly given him by the will. The executor had, therefore, not only the power to raise money for the purpose of paying the debts of his testatrix, but also the power to secure the loan by deed or mortgage.

2, 3. The question next arises, How much could the executor borrow, and to what extent would the estate be bound where he exceeded his authority? We agree with counsel for the plaintiff in error that the executor had power to borrow no

more money than was necessary to pay the debts—that his power was restricted to the exact amount of the debts. We do not, however, agree with him that, as the estate owed but three thousand four hundred dollars and the executor borrowed four thousand seven hundred dollars, the estate was liable for three thousand four hundred dollars only, the balance being the individual debt of the executor. Were this the correct view of the law, it would put upon every lender of money to an executor with similar powers, and upon every purchaser from an executor who had power to sell to pay debts, the burden of inquiring into the amount and the validity of the debts of the estate. The law does not cast such a burden upon lenders or purchasers dealing with executors who have powers such as those given in this will. Where such powers are given, the testator constitutes the executor his agent to borrow or to sell, and binds his estate for the acts of the agent or executor done within the scope of the business intrusted to him. He alone knows the amount and validity of the claims against the estate, and, where the money is borrowed or the sale made a short time after the probate of the will and within the statute of limitations of notes, accounts, or specialties, nearly all the authorities agree that it is not incumbent on the lender or purchaser to make inquiry as to the amount or validity of the claims against the estate. If the contract or transaction is free from fraud and collusion, and the purchaser or lender has no notice of the amount of the debts, the estate is bound. Of course, if the lender or purchaser colludes with the executor or has notice of the amount of the debts, and enters into the transaction to defraud the estate or lends more money or purchases more property than is necessary to pay the debts, the estate is not bound.

As early as the first volume of the reports of the decisions³⁰⁴ of this court, in the case of *Bond v. Zeigler*, 1 Ga. 324, 44 Am. Dec. 656, we find a recognition of this principle. There the executrix, under a power authorizing the sale of property to pay debts, sold certain property to Bond & Murdock, who were creditors of the estate. The amount of their debt was allowed them, and, the property having sold for more than this amount, the balance was paid in cash. The property was afterward levied upon by other creditors of the estate, who contended, among other things, that the purchasers were bound to ascertain the amount of the debts due by the estate. This court held that in such cases purchasers are not “required, be-

fore buying, to look into the accounts of the executor to ascertain that he is faithfully administering his trust; the law presumes this in his favor." It is true that the sale was of personal property, and it may be said that the executor, having title thereto by virtue of his office, could have sold it even without the power given by the will; but we find the same principle recognized in cases where the sale was of real property. In 2 Perry on Trusts, fifth edition, section 809, it is said: "The purchaser need not inquire into the necessity of a sale. Even express notice of the entire contents of a will cannot affect the purchaser of a chattel; for a purchaser of real estate under a power of sale to pay debts is not bound to investigate whether there are debts, nor to see to the application of the purchase money. And as all personal property is bound for the payment of debts, a purchaser is not bound to know whether there are debts or not, nor to see to the application of the purchase money." In Larue v. Larue, 3 J. J. Marsh. 157, the executors "were only authorized to sell so much land as was necessary to raise funds to pay the debts." They transcended these powers and sold more land than was necessary to pay the debts. The court said: "The will . . . gave them authority to sell for the purpose of paying debts. If they abused or transcended their authority, they are responsible to the heirs or devisees; but bona fide purchasers from them or their vendees cannot be affected, unless they have notice of the improper conduct of the executors. What debts [the executor] owed, or how much land it was necessary to sell to pay them, were matters of which the executors should judge, and upon which they alone were competent to decide. The testator ²⁰⁵ reposed confidence in them and gave them authority to act, and thereby strangers were invited to entertain confidence. It would, therefore, be unjust to permit strangers, who purchased in good faith, to sustain injury from the frauds of the executors." In Rutherford v. Clark, 4 Bush, 27, it was said: "When a will directs the sale of real estate, if necessary, for the payment of all the testator's debts or legacies, a purchaser at any such sale, not being presumed to know or to be able, by reasonable diligence, to know the condition of the estate or the extent of its indebtedness, or of its assets, should be protected in his purchase whenever made in good faith, without notice, actual or constructive, of the latent fact that there was no necessity for the sale, and consequent want of authority to make

it. If this were not so, prudent men would not bid a fair price at such sales."

In *Garnett v. Macon*, 6 Call, 308, 362, Chief Justice Marshall said: "The purchaser [of chattels] is not bound to make any inquiry. The general power of the executor to sell protects him in buying; but if he buys with notice that the sale is a breach of trust, the property remains charged with it. I feel much difficulty in resisting the application of this principle to freehold estates charged with the payment of debts. It would seem to me as if the inquiry must always be into the fact. The question must always be, Is the sale, taking its object into view, a breach of trust? And are the circumstances such as to charge a purchaser, having express notice, with a participation in the breach? The purchaser of a chattel from an executor, with notice that no debts are due, or in payment of his own debt, seems to me to present the same questions." And it was held by Brett, L. J., in *In re Tanqueray-Willlaume*, L. R. 20 Ch. D. 465, 482: "The question whether the purchaser's title [to real estate charged with the payment of debts] would be bad if there were not in fact any debts, supposing the time which has elapsed not to be too long, is determined by *Stroughill v. Anstey*, 1 De Gex, M. & G. 635, which is an authority for saying that if there is a charge of debts upon the property, then, if the purchaser has no knowledge that there are no debts, he has, except under peculiar circumstances, a right to assume that there are debts, and that his title is good whether there are or are not debts in ³⁰⁶ fact. So far, therefore, from its being prudent in him to ask this question, it is imprudent to ask it unless there has been sufficient lapse of time to call upon him to make that requisition": See, also, *Smith v. Henning*, 10 W. Va. 596, 640; 11 Am. & Eng. Ency. of Law, 2d ed., 1053, and notes. These authorities clearly show that this principle applies as well to the sale of land charged with debts as to the sale of personalty. The cases cited deal with sales by the executor, but there is, in our opinion, no difference as to this matter between a sale under a power to sell to pay debts and a mortgage given to secure a loan under a power to raise money to pay debts. It is incumbent on the lender to ascertain the power of the executor under the will, and, if the will gives the power to raise money to pay debts, it is not necessary for the lender to inquire into the amount of the debts or into the validity of the claims against the estate. Where the loan is made a long time after the death of the tes-

tator, so that there arises a presumption that the debts have all been paid, the estate is not bound beyond the amount of the debts actually owed. The expiration of a long period of time after the qualification of the executor would be sufficient to put the lender upon inquiry as to whether there are debts. In the present case, the loan was made within eighteen months after the probate of the will, and no fraud or collusion or notice of the amount of the debts, on the part of the mortgagee, was intimated in the record. The executor had the power to borrow the money to pay the debts of the estate, and the lender had the right to presume that this power was properly exercised. Not only was the executor the sole judge of the amount of the debts, but he alone knew of the amount of funds of the estate which were available to pay those debts. In order to determine the necessity for the loan, it was necessary to know, not only the amount of the debts, but also the amount of funds already on hand which were available to pay the debts. Into these matters we think the lender was under no duty to inquire. He was protected, having loaned the money in good faith and without notice, although, as matter of fact, the amount loaned exceeded the amount of the debts of the estate.

4. The power of the executor to raise money necessarily implied authority to secure the loan. We think it also necessarily ³⁰⁷ implied the authority to make a contract to pay the lender ten per cent attorneys' fees in case the debt had to be collected by suit. Contracts to pay attorneys' fees have been held good by this court, and are recognized by our Civil Code, section 3667. They are, however, not enforceable unless the party, when sued, files a plea and fails to sustain it. This court has held that the insertion of a stipulation for the payment of attorneys' fees does not destroy the negotiability of a promissory note. It seems now to be the general practice in this state for the borrower of money to insert in his note or contract an obligation to pay attorneys' fees in case the debt has to be collected by law. The power given the executor in the present case implied authority to raise the money in any proper and usual way, and the agreement to pay attorneys' fees was not improper or unusual. We therefore hold that the executor, having power under the will to raise the money in such manner as seemed best to him, had authority to contract for the payment of attorneys' fees if the note given had to be collected by suit.

Judgment affirmed.

All the justices concurring.

Common-law Powers of Executors.*

We shall not in this note treat of the powers of joint executors, or the powers of executors over property situated outside of the jurisdiction of their appointment. In brief, it may be said that at common law an executor had absolute power with reference to personal property, and no power whatever with reference to the real property left by a decedent. No distinction will be drawn between the powers of an executor and those of an administrator. Their powers even at common law were practically the same, except that an administrator's power did not accrue until after his appointment. But after administration was granted the power of an administrator was equal to and with the power of an executor: *Shaw v. Berry*, 35 Me. 279, 58 Am. Dec. 702; *Murray v. Blatchford*, 1 Wend. 583, 19 Am. Dec. 537. Indeed, prior to the statute of distribution, administrators stood on even a better footing than executors, because executors were required to pay legacies after the debts of the estate had been settled, whereas administrators had no legacies to pay, and the surplus of the personal estate, after payment of all the debts, belonged to them as absolute owners: *Potts v. Smith*, 3 Rawle, 361, 24 Am. Dec. 359. An executor with the will annexed likewise had the same rights of property as the executor named in the will if he had qualified: *Petersen v. Chemical Bank*, 32 N. Y. 21, 88 Am. Dec. 298.

Powers of Executor Before Probate.—An executor derives his power from the will, and not from its probate. The probate determines that the instrument is the will of the testator, but the executor named therein derives his power, not from the court of probate, but from the testator. For this reason an executor could exercise all the powers pertaining to his office which did not require a proferret of the letters testamentary: *Strong v. Perkins*, 3 N. H. 517; *Thiefes v. Mason*, 55 N. J. Eq. 456; *Gordon v. Woods*, 4 Bibb, 476; *Mitchell v. Rice*, 6 J. J. Marsh. 624. Hence, he could receive and dispose of the personal estate before probate: *Thiefes v. Mason*, 55 N. J. Eq. 456. Since the executor's title accrues at the moment the testator dies, he may do many acts which pertain to his office without probate, such as collect debts, sell property, pay debts and legacies, and his acts will be legal: *Marcy v. Marcy*, 32 Conn. 308; *Gordon v. Woods*, 4 Bibb, 476; *Rand v. Hubbard*, 4 Met. 252; *Baldwin v. Buford*, 4 Yerg. 16; *Shirley v. Healds*, 34 N. H. 407. Indeed, an executor before probate of a will could do almost everything which he could do after probate: *Mitchell v. Rice*, 6 J. J. Marsh. 624; *Gilbert v. Bartlett*, 9 Bush, 49. The will must, however, subsequently be admitted to probate in order to render the executor's acts valid for all time and for all purposes. Probate is essential

***REFERENCE TO MONOGRAPHIC NOTES.**

Power and duty of executors as to property outside the state: 45 Am. St. Rep. 661-674.

When executors are by implication vested with power to sell: 87 Am. Dec. 209-217.
Powers of executors before probate: 55 Am. Dec. 436-439.

to sustain his acts: *Wood v. Nelson*, 9 B. Mon. 600. The executor may make an inventory of the testator's personal effects and take possession of them. He may enter peaceably into the house of the heir and take the securities for debts due the deceased, and remove his goods: *Hathorn v. Eaton*, 70 Me. 219. In Pennsylvania it seems that an executor's powers before probate are limited to merely passive acts, such as receiving notice of the dishonor of a note, since they have immediate power to qualify themselves to act if they choose and if the occasion requires it: *Shoenberger v. Lancaster Sav. Inst.*, 28 Pa. St. 459. This is, however, a modification of the common-law rule, for at common law an executor had power before probate to do almost any act belonging to his office, except to sue and to defend suits: *Gilbert v. Bartlett*, 9 Busn, 49. The only reason for denying him the power to sue was the necessity of making profert of his letters testamentary. He could commence his action, but he could not declare, because when he declares he must make profert: *Rand v. Hubbard*, 4 Met. 252; *Gordon v. Woods*, 4 Bibb, 476; *Mitchell v. Rice*, 6 J. J. Marsh. 624. If after suit was commenced he procures letters testamentary before he declares at law, or before the case comes to a hearing in equity, such letters will be construed to relate to the commencement of the action: *Baldwin v. Buford*, 4 Yerg. 16. Thus, he has the right to bring his action and proceed to the point where profert is necessary, even before the will is admitted to probate.

There are, however, certain cases in which the executor is not required to produce his letters testamentary in order to recover. He may maintain trover before probate for goods of the testator taken out of his possession, for in such a case the profert of letters testamentary is not necessary, such action being founded on his possession: *Rand v. Hubbard*, 4 Met. 252. Indeed, any action founded on his own possession, such as trespass, detinue, or replevin, for goods or cattle taken after the testator's death, could be maintained by an executor prior to the probate of the will: *Hathorn v. Eaton*, 70 Me. 219. Even such personal effects as never came into his actual possession, but which had been taken and converted after the testator's death, he could sue for in trespass or trover without producing letters testamentary: *Hathorn v. Eaton*, 70 Me. 219; *Baldwin v. Buford*, 4 Yerg. 16. He might also sue on any contract made with him after the testator's death: *Baldwin v. Buford*, 4 Yerg. 16; *Gordon v. Woods*, 4 Bibb, 476. Where the local practice did not require a profert of letters testamentary in order to declare, an action could regularly be commenced before the will had been proved: *Strong v. Perkins*, 8 N. H. 517.

An Administrator, Before Administration is Granted to Him, can do nothing, because he derives his authority entirely from the appointment by the court: Rand v. Hubbard, 4 Met. 252; Vroom v. Van Horne, 10 Paige, 549, 42 Am. Dec. 94. Although the administrator has no power prior to the grant of administration, yet when

he does receive his appointment, his title to the decedent's property relates back to the time of such decedent's death, and validates all acts done before the grant of letters which are within the scope of the administrator's authority and which are beneficial to the estate: *Globe Accident Ins. Co. v. Gerish*, 163 Ill. 625, 54 Am. St. Rep. 486; *Alvord v. Marsh*, 12 Allen, 603; *Priest v. Watkins*, 2 Hill, 225, 38 Am. Dec. 584; *Cook v. Cook*, 24 S. O. 204. The rule that the letters of administration relate back to the death of the intestate and legalize intervening acts is admitted for the purpose of supporting the rights of the intestate, and of ratifying acts for the benefit of his estate, and giving a remedy where otherwise there would be none: *Leber v. Kauffelt*, 5 Watts. & S. 440.

Pending the Contest of a Will, an Executor Has Power to perform all those acts which he has general power to perform, provided he has received letters testamentary. Hence, where an executor has obtained letters testamentary on a supposed will, and subsequently another will is produced, he is not deprived of his power to perform the usual acts of an executor, notwithstanding the pendency of litigation respecting the validity of the will: *Bradford v. Boudinot*, 3 Wash. O. C. 122. If the executor had not received his appointment, it seems doubtful just how extensive his powers were. His powers being derived from the will and not from its probate, his acts pending a contest would certainly be valid and binding if the will should be sustained. If letters of administration pendente lite had been granted to him or to another, such letters conferred limited powers, and the executor's powers were temporarily suspended: *Syme v. Broughton*, 86 N. O. 153; *In re Flandrow*, 92 N. Y. 256. An executor certainly has the power to defend the will in any contest about it: *Brown v. Gibson*, 1 Nott & McC. 326. And the executor is in such privity with the testator that, in a proceeding to revoke the probate of a will, he can invoke the benefit of the heir's covenant not to contest the will: *Estate of Garcelon*, 104 Cal. 570, 43 Am. St. Rep. 134. The executor, however, is not obliged to assume the burden of the expense of a will contest, but may properly throw it upon the legatees or devisees: *Andrews v. Andrews*, 7 Ohio St. 143.

Support of Decedent's Family.—An executor, as such, has no rights as guardian, nor has he any authority over the minor children of his testator: *Boyd v. Glass*, 34 Ga. 253, 89 Am. Dec. 252. Executors and administrators are merely legal trustees for the creditors and heirs of the decedent. Not being the guardian of the decedent's children, they can incur no fiduciary liability on their account. As was said in *Meniffee v. Ball*, 7 Ark. 520: "It would be a breach of trust for them to expend any of the effects of the estate for their benefit. The care of the children is entirely out of their province. That devolves upon their guardians." If the estate is insolvent, it is a devastavit for the executor to give any of the personal estate to support the widow or children: *Billing-*

ton's Appeal, 8 Rawle, 48. Not only has an executor no authority to maintain the decedent's family out of the assets of the estate, but he cannot in the settlement of his accounts, as such, be allowed a credit for any expenses incurred for that purpose: In re Rose, 80 Cal. 166; Brewster v. Brewster, 8 Mass. 131; Washburn v. Phillips, 5 Smedes & M. 600; Jones v. Coon, 5 Smedes & M. 751; State v. Donegan, 83 Mo. 374; McKinney v. Watson, 8 Serg. & R. 347. Hence, credit will not be given to an administrator for boarding and clothing furnished the minor children of the decedent: Willis v. Willis, 9 Ala. 330. A claim for the support of the minor children is properly disallowed where the executor is not the guardian of such minors: Mitchell v. Harrison, 32 Tex. 331, 5 Am. Rep. 245. Such expenses are not properly claims against the estate, nor a part of the expenses of administering it: Sorrels v. Trantham, 48 Ark. 386. This rule applies both to the widow and children, and to any other person however nearly connected or dependent upon the estate: Washburn v. Hale, 10 Pick. 429. When an administrator attempts to furnish out of the estate of the intestate in his hands the means to support and educate the heirs, he assumes the functions of a guardian and acts entirely upon his own responsibility: Estate of Fitzgerald, 57 Wis. 508. There is no doubt that the common law denied the executor authority to use the funds of the estate in his hands for the support of the family, and if he did so use the funds it was at his own risk, and credit was not given him in his account for such disbursements. Yet the courts have occasionally dealt leniently with executors under some circumstances. But when this has occurred it has been in disregard of the common-law rule. Thus in Darby v. Darby, 2 McCord Eq. 451, an administratrix was allowed credit for sums expended for the clothing and necessary maintenance and education of the intestate's children prior to due notice and application of creditors, while the estate was deemed solvent. In allowing this credit the court said: "The situation of executors and administrators is exceedingly embarrassing in many cases of estates in their hands. The deceased often leaves a good deal of property and a family accustomed to live in comfort on that property. The real situation of the estate as to debts is not and cannot be known with any certainty for a considerable time. To refuse support to the family would be considered hard and unjust on mere apprehension of danger of insolvency. To make the requisite advances at the risk and responsibility of the executors and administrators is requiring more than can be reasonably expected in the common course of life. In this dilemma the sound principle would be to allow moderate and reasonable advances made for the support of the family, in the bona fide expectation that the estate was solvent and made prior to the application of creditors, whose demands would make the estate insolvent." This is not, however, the true common-law rule. And while an executor has no authority to support the decedent's

family out of the personal estate in his hands, and if he assumes to do so he will not be given credit in his account for such expenditures, yet there can be no doubt that if the estate is solvent an executor can employ the funds of the estate in the support of the decedent's family, if he limits the amount of such support to the distributive shares to which the members of the family are entitled. It is not misconduct for an executor to use funds in his hands to supply the present and urgent wants of the widow and children, where there is certain to be a large surplus after payment of debts to be distributed among such widow and children: *Billington's Appeal*, 8 Rawle, 48. The executor or administrator is entitled to credit as against the shares of the widow and children in the estate: *Succession of Broadaway*, 3 La. Ann. 591; *Pettit's Appeal*, 89 Pa. St. 324; *Munden v. Bailey*, 70 Ala. 63; *Sorrels v. Trantham*, 48 Ark. 386; *In re Moore*, 96 Cal. 522; *In re Rose*, 80 Cal. 166. In making such advances for the family support the executor or administrator acts without authority and at his peril: *Hyland v. Baxter*, 98 N. Y. 610; *In re Moore*, 96 Cal. 522. But if the distributive shares of those for whose benefit the expense has been incurred are sufficiently large to warrant the risk, the executor can with safety advance money for such purposes.

General Power Over Real Property.—At common law the real property descended to the heir, and neither an executor nor administrator took any estate, title, or interest therein: *Leavens v. Butler*, 8 Port. 380; *Patton v. Patton*, Winst. Eq. 20, 86 Am. Dec. 448; *Floyd v. Herring*, 64 N. C. 409. An executor or administrator is the representative of the personalty alone. By virtue of his office, an executor has no power to dispose of the lands of the decedent: *Frost v. Atwood*, 73 Mich. 67, 16 Am. St. Rep. 560. Lands were not assets in his hands for the payment of debts: *Sheldon v. Estate of Rice*, 30 Mich. 296, 18 Am. Rep. 136. Unless the land was specifically burdened with debts, so as to create a charge upon it, it could not be disposed of for the benefit of creditors. It is only by statute that lands have been made assets for the payment of debts and that executors have been given any power over the real property of an intestate: *McPike v. Wells*, 54 Miss. 136; *White v. Beard*, 5 Port. 94, 30 Am. Dec. 552. The executor's powers extended only to personal property. Real property, as such, he had no power over: See *Ticknor v. Harris*, 14 N. H. 272, 40 Am. Dec. 186. He could not sell it for the payment of debts: *Filmore v. Reithman*, 6 Colo. 120; *Buckner v. Cromie*, 5 Bush, 603; *Montague v. Carneal*, 1 A. K. Marsh. 352; *Litterall v. Jackson*, 80 Va. 604. The rents of real property follow the realty and belong to the heirs or devisees, so that the executor has no control over them, except the rent due and payable prior to the decedent's death, in which case it is personal property: *Bealy v. Blake*, 70 Mo. App. 229; *Aubuchleon v. Lory*, 23 Mo. 99.

Since an executor takes no interest in the real property and has no power over it, he is naturally without authority to lease the

testator's lands: *Rutherford v. Clark*, 4 Bush, 27; *Lee v. Lee*, 74 N. C. 70; because both the land and its rents and profits belong to the heir: *Merkel's Estate*, 131 Pa. St. 584. Certainly, an executor or administrator has no power to mortgage any of the decedent's lands: *Black v. Dressell*, 20 Kan. 153; *Smithwick v. Kelly*, 79 Tex. 564; *Smith v. Hutchinson*, 108 Ill. 662.

Taxes levied upon lands of the decedent prior to his death constitute a debt against the decedent for which he was personally liable. Being a debt due from the estate, an executor or administrator has power to pay it the same as any other debt against the estate: *Findley v. Taylor*, 97 Iowa, 420; *Henderson v. Whiting*, 56 Ind. 181; *Bowers v. Williams*, 34 Miss. 824; *Matter of Steward*, 90 Hun, 94. Taxes levied upon a decedent's lands subsequent to his death are not a personal charge against the decedent, the liability in such case being on the heir or devisee. Hence an executor has no authority to pay such taxes: *Henderson v. Whiting*, 56 Ind. 181; *Moody v. Hemphill*, 71 Ala. 169; *Stone v. Wood*, 16 Ill. 177; *Fessenden, Appellant*, 77 Me. 98. The executor has no power to pay taxes levied subsequent to the testator's death, even if it is done for the purpose of protecting the realty: *Phelps v. Funkhouser*, 89 Ill. 401; *Reeves v. McMillan*, 101 N. C. 479. If an executor does pay taxes levied upon the real estate subsequent to the testator's death, he is not entitled to credit for such payment in his final account: *Polhemus v. Middleton*, 37 N. J. Eq. 240; *Reeves v. McMillan*, 101 N. C. 479; *Hahn v. Mosely*, 119 N. C. 73. Assessments for local improvements made after the decedent's death are, in like manner, no charge against the estate which the executor can pay, but the liability is on the heir, and if the executor assumes to pay such assessment he cannot be given credit for it in his account: *In re Motier's Estate*, 7 Mo. App. 514. Whether an executor has power to pay assessments for local improvements made prior to the testator's death would appear to depend on the question whether such assessments became a personal liability of the testator before his death. If they did, then the assessments are debts against the estate which the executor can pay as other debts. But if they are not debts, the executor would seem to be without authority to pay them.

An executor has generally no authority to insure the real property: *Aldridge v. McClelland*, 86 N. J. Eq. 288; nor to make improvements thereon: *Aldridge v. McClelland*, 36 N. J. Eq. 288; *Fay v. Muzzey*, 13 Gray, 53, 74 Am. Dec. 619; *Byrd v. Governor*, 2 Mo. 102; *Cornwell v. Deck*, 2 Redf. 87; and credit will not be given him if he uses the personal estate in improving the realty: *Lucy v. Lucy*, 55 N. H. 9; *Cannon v. Copeland*, 43 Ala. 252; *In re Motier's Estate*, 7 Mo. App. 514. If the interest in the realty is a leasehold interest, the executor may make reasonable repairs and improvements: *Ames v. Downing*, 1 Bradf. 321.

The general rule is that an executor has no right to purchase any property of the estate at a sale thereof, for the reason that a trustee is not allowed to make a profit out of the trust property. At common law, however, this rule would seem to be inapplicable to a purchase of real estate by an executor, since he is not a trustee of the real estate and he owes no duty to the heir with respect thereto. Hence if the real estate is sold at a foreclosure sale or under an execution or at any other judicial sale, the executor may purchase it for himself, and he is not violating any fiduciary obligation by so doing: *Johns v. Norris*, 22 N. J. Eq. 102; *Earl v. Halsey*, 14 N. J. Eq. 332; *Hollingsworth v. Spaulding*, 54 N. Y. 636. In the absence of a relationship of trust between the executor and the heirs and devisees, the executor is a competent purchaser of the decedent's land: *Briant v. Jackson*, 99 Mo. 585. This is undoubtedly the true common-law rule, and a sale to an executor is valid unless there was fraud in it: *Johns v. Norris*, 27 N. J. Eq. 485. If the land was sold under execution to satisfy a debt which the executor should have paid, and he had sufficient personal estate with which to pay the debt, but refrained from doing so for the sole purpose of compelling a sale of the real estate, which he purchased at an inadequate price, such a purchase can be avoided by the devisees who have been injured thereby. The executor holds the land in trust for them: *Prindle v. Beveridge*, 7 Lans. 225.

An executor or administrator cannot avoid a decedent's sale of realty which was made in fraud of creditors: *Davis v. Swanson*, 54 Ala. 277, 25 Am. Rep. 678; *Snodgrass v. Andrews*, 30 Miss. 472; 64 Am. Dec. 169; *George v. Williamson*, 26 Mo. 190, 72 Am. Dec. 203; because such sale is valid as between the parties thereto, and an executor or administrator can stand in no better position than the decedent. A debt of the estate which is secured by a mortgage on real property is nevertheless a debt which may be paid out of the personal property, and an executor, therefore, has power to pay such a mortgage debt, and the heirs can compel him so to do if the personal property is sufficient for that purpose. The personal property is liable for any personal debts of the deceased whether secured by mortgage or not: *Newcomer v. Wallace*, 30 Ind. 216; *Sutherland v. Harrison*, 86 Ill. 363; *Lennig's Estate*, 52 Pa. St. 135; *Gould v. Winthrop*, 5 R. I. 319. But an executor has no power to redeem a mortgage out of the state in which he is appointed: *Haven v. Foster*, 9 Pick. 112, 19 Am. Dec. 353. The deceased must have been personally liable for the mortgage debt in order to render the personal assets liable for its payment and to justify the executor in satisfying the mortgage: *Woods v. Huntingford*, 3 Ves. Jr. 181; *Earl of Oxford v. Rodney*, 14 Ves. Jr. 417.

In those jurisdictions where a mortgage conveys to the mortgagee only an equitable title, mortgages in the possession of the deceased mortgagee at the time of his death, and which were security for debts due him, are part of his personal assets to which the executor

or administrator is entitled and which he may either sell or foreclose: See Crooker v. Jewell, 31 Me. 306; Copper v. Wells, 1 N. J. Eq. 10; Gibson v. Bailey, 9 N. H. 168; Libby v. Mayberry, 80 Me. 137; Ex parte Blair, 13 Met. 126; Williams v. Ely, 13 Wis. 1. The mortgage in such a case is considered as a mere incident of the debt, and may be disposed of by the executor in the same manner as the debt itself: Ladd v. Wiggin, 35 N. H. 421, 69 Am. Dec. 551. Wherever the decedent's interest in realty was a chattel interest, the executor has the right to its possession and disposal by reason of the fact that it is personal property. Hence an executor may sell a lease for years belonging to the decedent as absolutely as any other personal property of the estate: Seers v. Hind, 1 Ves. Jr. 294; Andrews v. Wrigley, 4 Bro. C. C. 125; Nugent v. Gifford, 1 Atk. 463.

Power to Buy and Sell Land.—Ordinarily, executors have no power to purchase real estate: Wilson v. Mason, 158 Ill. 304, 49 Am. St. Rep. 162; Shelton v. Bone (Tex. Civ. App.), 26 S. W. Rep. 224: If land is purchased, however, with funds of the estate, the executor so purchasing has the power to convey the property to another: Williams v. Towl, 65 Mich. 204. It seems, however, that where a mortgage belonging to the estate is foreclosed, the executor may purchase the property if necessary to protect the estate. Certainly, he can do so where the mortgage is a personal security which the executor has the power to foreclose. In such a case the executor holds the land in trust: Mabary v. Dollarhide, 98 Mo. 198, 14 Am. St. Rep. 639; Dusing v. Nelson, 7 Colo. 184; Holcomb v. Holcomb, 11 N. J. Eq. 281; Briggs v. Chicago etc. R. R. Co., 56 Kan. 526; Clark v. Clark, 8 Paige, 152, 35 Am. Dec. 676. Such land, however, after the executor has purchased it, is not held as real estate so far as the heirs are concerned, but is held as personal property. It is personal assets in his hands, and hence may be sold with the same liberty as any other personal assets of the decedent: Stevenson v. Polk, 71 Iowa, 278; Haberman v. Baker, 128 N. Y. 253.

With respect to the contracts of the decedent for the purchase or sale of real estate, it seems that an executor or administrator can enforce against a vendee the decedent's contract to sell his realty. Such a contract works an equitable conversion of the land into personalty from the time when it was made, and, therefore, the purchase money becomes a part of the vendor's personal estate, over which the executor has control: Miller v. Miller, 25 N. J. Eq. 354. Whether an executor can perform a contract to purchase realty seems more doubtful. Wilson v. Mason, 158 Ill. 304, 49 Am. St. Rep. 162, intimates that an executor has such power. But that this is questionable is apparent from the fact that the interest which the decedent had in the lands under such a contract is real property, which descends to the heirs and over which the executor has no control. If the contract price has been paid by the decedent but no conveyance

has been made by the vendor, there can be no reasonable doubt that the only interest which the decedent had in such property was real estate solely, and that an executor or administrator has no power to compel specific performance on the part of the vendor, but that such right is vested in the heirs: *Carpenter v. Fopper*, 94 Wis. 146. If the purchase price has not been paid, and the promise to pay it amounts to a debt, the heirs can compel the executor to discharge the contract out of the personal estate, but probably the executor, without the consent of the heirs, has no authority by virtue of his office to compel a specific performance of the contract: *Champion v. Brown*, 6 Johns. Ch. 398, 10 Am. Dec. 343. See, also, *Ewing v. Handley*, 4 Litt. 346, 14 Am. Dec. 140. Certainly, at common law, a covenant to convey land which was not broken until after the covenantee's death was a covenant real which descended to the heirs, and the right of action upon such covenant belonged to them and not to the executor: *Hatcher v. Galloway*, 2 Bibb, 180. If such a covenant had been broken prior to the covenantee's death, the right to recover damages for such breach was in the covenantee, and, being personalty, vested in the executor, who in such case had a right of action: *Hatcher v. Galloway*, 2 Bibb. 180.

General Powers Over Personal Estate.—At law an executor becomes for most purposes the owner of the legal title to the goods of his testator, and may dispose of them as if they were his own, except that he cannot bequeath them, nor can they be taken to pay his debts: *Petrie v. Clark*, 11 Serg. & R. 377, 14 Am. Dec. 636; *Petersen v. Chemical Bank*, 32 N. Y. 21, 88 Am. Dec. 298; *Kelly v. Kelly*, 9 Ala. 908, 44 Am. Dec. 469; *Upchurch v. Norsworthy*, 12 Ala. 532.

In this respect administrators and executors occupy the same position: *Beecher v. Buckingham*, 18 Conn. 110, 44 Am. Dec. 580. The personal estate of the deceased, and all contingent as well as absolute interests therein, vest in his administrator, including his bonds, contracts, and choses in action, as well as his goods and chattels, and can be diverted only by operation of law or some act of the administrator: *Ladd v. Wiggin*, 35 N. H. 421, 69 Am. Dec. 551. The only difference in this respect between an executor and an administrator is that the title of an administrator vests only upon his appointment: *Ladd v. Wiggin*, 35 N. H. 421, 69 Am. Dec. 551; while the executor's title vests immediately upon the testator's death: *Shirley v. Healds*, 34 N. H. 407; *Johns v. Johns*, 1 McCord, 132. The executor or administrator has absolute dominion over the personal property: *Johns v. Johns*, 1 McCord, 132. His rights as to it are exclusive, and he is the only representative the law will regard: *Beattie v. Abercrombie*, 18 Ala. 9; *Shirley v. Healds*, 34 N. H. 407; *Rouggle v. Teichmann*, 10 Mo. App. 257. The title to the personalty being in the executor, the heir can secure title thereto only through him by virtue of administration. And this is true though there are no debts and the heir is the sole distributee: *Becraft v. Lewis*, 41 Mo. App. 546. The title being in the executor, he is the

only person entitled to the possession of the personal property: *Smith v. Ferguson*, 90 Ind. 229, 46 Am. Rep. 216; *Naylor v. Moffatt*, 29 Mo. 126; *Cain v. Warford*, 7 Md. 282; *Cook v. Burton*, 5 Bush, 64. Neither a legatee nor any other person has any right to its possession until the personal representative has assented to it: *Upchurch v. Norsworthy*, 12 Ala. 532; *Cook v. Burton*, 5 Bush, 64. The right of possession includes property covered by a bill of sale from him, but never delivered: *Palmer v. Palmer*, 55 Mich. 293. This right to the possession of the personalty continues until the debts are settled and the legacies paid—in fact, until the close of administration: *Grimmell v. Warner*, 21 Iowa, 11. Personal property vesting in the executor includes shares of stock in a corporation, the title to which is taken by such executor by virtue of his office. He is a stockholder of the company, representing the estate and is clothed with all the rights appertaining to the ownership of the stock, including the right to vote at meetings of the corporation. No formal transfer on the books is required to give him this right: *In re North Shore etc. Ferry Co.*, 63 Barb. 556; *In re Election of Cape May etc. Nav. Co.*, 51 N. J. L. 78.

To enforce his right of possession, an executor may sue anyone who retains control of the testator's personalty: *Upchurch v. Norsworthy*, 12 Ala. 532; *Smith v. Ferguson*, 90 Ind. 229, 46 Am. Rep. 216. He may maintain such action wherever the testator could if he were alive: *Smith v. Grove*, 12 Mo. 51. He may recover the specific property and not merely its value: *Sears v. Carrier*, 4 Allen, 339. He may also file a bill in equity for the discovery of assets of the estate, and this though the statute has conferred a summary right at law for such purposes: *Grimes v. Hilliary*, 38 Ill. App. 246; *Pratt v. Northam*, 5 Mason, 95; *Meyer v. Garthwaite*, 92 Wis. 571. Such a suit may be brought against the general agent of a deceased person for a discovery and an accounting of the transactions of the agent with the deceased principal: *Simmons v. Simmons*, 33 Gratt. 451.

The executor or administrator is, in law, the personal representative, or substitute, of the deceased; and he can prosecute suits in favor of, and defend suits against, the estate he represents: *Morris v. Murphey*, 95 Ga. 307, 51 Am. St. Rep. 81; *Richardson v. Donehoo*, 16 W. Va. 685. But he cannot maintain an action for the seduction of a daughter or servant of a deceased father or master in his lifetime: *George v. Van Horn*, 9 Barb. 523. In carrying out the terms of a will an executor represents all the parties interested, and he therefore may appeal from a decision interpreting the will, where such decision is adverse to the heirs and contrary to the intention of the testator: *Succession of Allen*, 48 La. Ann. 1036, 55 Am. St. Rep. 295. At early common law no action could be maintained by an executor or administrator to recover damages for an injury done either to the person or property of his testator or intestate. Such an action died with the person. But this defect was remedied by

early statutes in England: *Blakeney v. Blakeney*, 6 Port. 109, 30 Am. Dec. 574. For an injury to the real estate, to the freehold, an executor or administrator could not sue, because the lands and the rights therein descended to the heir, and a right of action for an injury to them was in the heirs: *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114. Where, however, the claim for damages to the realty is deemed a chose in action, it is a personal asset, vests in the executor, and he may sue to recover for the injury: *Webster v. Lowell*, 139 Mass. 172; *Griswold v. Metropolitan etc. Ry. Co.*, 122 N. Y. 102. This would appear to be the result of legislation, however, and at common law it seems quite clear that an executor or administrator could not bring trespass for an injury to the freehold: *Rockwell v. Saunders*, 19 Barb. 473. An administrator may sue for an injury to personal property which occurred after the death of the intestate and before administration was granted: *Babcock v. Booth*, 2 Hill, 181, 38 Am. Dec. 578; *Valentine v. Jackson*, 9 Wend. 302; *Rockwell v. Saunders*, 19 Barb. 473; *Hutchins v. Adams*, 8 Me. 174; *Bell v. Speight*, 11 Humph. 451.

The legal title to personalty is in the executor for the purposes of taxation. The assessment may be made against him, and he has power to pay such taxes: *Mayor v. Alexander*, 10 Lea, 475; *Cook v. Leland*, 5 Pick. 236; *Cornwall v. Todd*, 38 Conn. 443.

The slight value placed upon personal property at common law was probably one reason for the extensive powers which executors and administrators possessed with reference thereto. At the old common law they could sell, give away, or in any other manner dispose of it. So completely were the personal assets deemed their property that claims against them, in respect to assets in their hands, were personal demands at law: *Sneed v. Hooper*, Cooke, 200, 5 Am. Dec. 691. It has even been said in some cases that an executor or administrator was, for every purpose, the owner of the personal property of the testator or intestate which came to his hands: *Lacompte v. Seargent*, 7 Mo. 351. But this is not true, and was not even at common law. While his title was absolute, it was fiduciary and not beneficial. He held only as trustee for the creditors and legatees, and not for his own benefit: *Lessing etc. Co. v. Vertrees*, 32 Mo. 431; *Petersen v. Chemical Bank*, 32 N. Y. 21, 38 Am. Dec. 298; *Hill v. Mitchell*, 5 Ark. 608; *Woodhouse v. Phelps*, 51 Conn. 521. Notwithstanding the holding was of this character, the absolute power of disposal over all the personal effects was in him, and he could sell them and convey good title to the purchaser, and they could not be followed by creditors or legatees: *Petersen v. Chemical Bank*, 32 N. Y. 21, 38 Am. Dec. 298. The executor would, however, be liable for a misapplication of the assets, such acts being a *devastavit* which renders him personally liable.

In England, at common law, an executor, after the payment of debts and legacies, was entitled to retain what remained of the personal assets undisposed of. The mere appointment of an execu-

tor was, at law, deemed a gift of everything not disposed of: *Urquhart v. King*, 7 Ves. Jr. 228. As was observed in *Hadley v. Kendrick*, 10 Lea, 525: "Personal property was, by the common law, considered of so little value that no provision was made for its descent to the heirs at law of the owner. Indeed, up to 22 & 23 Charles II, the date of the passage of the statute of distributions, an administrator was entitled exclusively to enjoy the residue of the intestate's effects, after the payment of the debts and funeral expenses." There could be no undevised personal estate in a will where an executor was appointed, because he held all of such estate for the payment of debts and legacies, and if any remained after this it belonged to him: *Hays v. Jackson*, 6 Mass. 149. The rule that the surplus undisposed of went to the executor will be found fully discussed in *Shelton v. Shelton*, 1 Wash. (Va.) 53, and in *Wilson v. Wilson*, 3 Binn. 557. The same rule applied to administrators as to executors: *Hadley v. Kendrick*, 10 Lea, 525; *Bufford v. Holliman*, 10 Tex. 560, 60 Am. Dec. 223. Indeed, as already pointed out, prior to the statute of distributions, an administrator stood in even a better position than an executor, since he had no legacies to pay, and the surplus after the payment of debts belonged to him absolutely: *Potts v. Smith*, 3 Rawle, 361, 24 Am. Dec. 359. This strict common-law right of an executor was qualified in equity, where he seems to have been treated as a trustee for the heirs as to the surplus in his hands. The rule is changed by statute in England, and it seems never to have been of much practical importance in this country, where the executor has been practically always treated as a trustee for the heirs and next of kin as to all of the personal property of the testator not disposed of by his will: *Wilson v. Wilson*, 3 Binn. 557; *Lewis v. Lyons*, 13 Ill. 117; *Parris v. Cobb*, 5 Rich. Eq. 450. The prevalence of statutes of distribution is probably one reason for this: *Paup v. Mingo*, 4 Leigh, 163; *Hays v. Jackson*, 6 Mass. 149.

An executor is entitled to administer on the entire estate, whether it is all devised or not: *Dean v. Biggers*, 27 Ga. 73; *Venable v. Mitchell*, 29 Ga. 566. And he is not required to secure special letters of administration for that purpose, but he may administer on the undevised portion of the estate, *ex officio*, as executor: *Hays v. Jackson*, 6 Mass. 149.

The executor has power to do any act to preserve and protect the personal estate. But, as we shall see later, he can make no contract which will bind the estate, even though it be for its benefit. If such contracts are made, they bind the executor personally, though he will be allowed credit for such necessary expenses in his account, as costs of administration. Hence an executor may employ medical attendance for slaves owned by a deceased, in his possession, when sick, and such expenses will be allowed as costs of administration: *Bomford v. Grimes*, 17 Ark. 567. And an executor

or administrator may insure against loss by fire, if such a precaution would have been adopted by reasonably prudent men: *Rubottom v. Morrow*, 24 Ind. 202, 87 Am. Dec. 324. But it is ordinarily not within the authority of an executor or administrator to manage the estate for the benefit of the heirs: *Brenham v. Story*, 39 Cal. 179.

Funeral Expenses.—The estate of a deceased person is liable for all reasonable expenses incident to providing a decent burial, and an executor has power to pay such expenses the same as any other legitimate claim against the estate: *Fogg v. Holbrook*, 88 Me. 169; *Cowden v. Jacobson*, 165 Mass. 240; *Loftis v. Loftis*, 94 Tenn. 232; *Matter of Miller*, 4 Redf. 302. If, however, the deceased was a married woman, ordinarily the executor has no authority to pay the funeral expenses out of her estate, and he is not entitled to credit in his final account if he does pay them: *Galloway v. McPherson*, 67 Mich. 546, 11 Am. St. Rep. 596; *Sears v. Giddey*, 41 Mich. 590, 32 Am. Rep. 168. The duty of the husband to bury his deceased wife is involved in his obligation to maintain her while living, and he is bound to defray the necessary funeral expenses. It is for this reason that an executor of a wife has no power to pay the expenses of her funeral, and if he does so credit will not be given him for the amount so expended: *In re Weringer*, 100 Cal. 345. And this is true though a married woman is by statute given the exclusive use and ownership of her separate property, free from any claim or control of her husband: *Smyley v. Reese*, 53 Ala. 89, 25 Am. Rep. 598. Reasonable expenditure for mourning apparel for the widow and children is a legitimate part of the funeral expenses, which an executor has authority to pay and for which he may be allowed credit: *In re Wachter's Estate*, 16 Misc. Rep. 137; 38 N. Y. Supp. 941; *Allen v. Allen*, 3 Dem. Surr. 524. He also has the right to purchase a burial lot for the decedent, but in so doing he must consider the condition of the estate, whether it is solvent or insolvent, and the circumstances attending the expenditure: *Clemes v. Fox*, 6 Colo. App. 377; *Birkholm v. Wardell*, 42 N. J. Eq. 337. But it seems that an executor is not authorized to improve the burial lot by erecting a fence to inclose it: *Tuttle v. Robinson*, 33 N. H. 104. But the cost of a suitable tombstone is one of the legitimate funeral expenses which may be incurred by an executor, providing it is not disproportionate to the means of the estate or injurious to the interests of creditors and the family of the deceased: *Bendall v. Bendall*, 24 Ala. 295, 60 Am. Dec. 469; *Van Emon v. Superior Court*, 70 Cal. 589; 9 Am. St. Rep. 258; *Webb's Estate*, 165 Pa. St. 330, 44 Am. St. Rep. 666; *Moulton v. Smith*, 16 R. I. 126, 27 Am. St. Rep. 728; *Griggs v. Veghte*, 47 N. J. Eq. 179. While a contract of this character does not bind the estate, but the executor personally, yet he will be given proper credit for such expense in his account: *Ferrin v. Myrick*, 41 N. Y. 315; *Pistorious' Appeal*, 53 Mich. 350. The expenses of religious ceremonies, including the services of a priest and a wake,

have been considered legitimate funeral expenses which an executor has authority to incur: *Garvey v. McCue*, 3 Redf. 313.

Connected with the funeral expenses is the right of an executor to the possession of the body of the decedent. In England, it seems that the common law gave to executors such right, and that there was no such property in a dead body as would give one the right to dispose of his own remains by will, the executors having the right to its possession notwithstanding a direction in the will. Such right extended both to the possession of the body and the authority to bury it: *Williams v. Williams*, L. R. 20 Ch. D. 659. Such right and power in an executor seems never to have been recognized in this country, the right of custody and burial of the deceased person being considered as belonging to the surviving relatives: *Renihan v. Wright*, 125 Ind. 536, 21 Am. St. Rep. 249; *Bogert v. Indianapolis*, 13 Ind. 134; *Griffith v. Charlotte etc. R. R. Co.*, 23 S. O. 25, 55 Am. Rep. 1.

Mortgage or Pledge of Assets.—An executor has full right and authority to mortgage or pledge personal assets of the estate. This seems to have been a common practice in England, and the obvious inconvenience if an executor did not have such authority was pointed out in *Vane v. Rigden*, L. R. 5 Ch. App. 663. It was said in this case that “he has complete and absolute control over the property, and it is for the safety of mankind that it should be so, and nothing which he does can be disputed, except on the ground of fraud or collusion between him and the creditor.” An executor has the same authority to mortgage and pledge that he has to sell. And his authority in this respect is not limited by the fact that the testator has created a particular fund for the payment of debts, of which the property pledged or sold does not form a part, and the purchaser has notice of the will: *Tyrrell v. Morris*, 1 Dev. & B. Eq. 559. An executor may also turn a pledge into an absolute sale: *Tyrrell v. Morris*, 1 Dev. & B. Eq. 559. The legal title to all the personal property is in the executor or administrator, and in dealing with such property for the purposes of the estate he may be required to pledge it for the benefit of the estate. And if he deals honestly with it, the pledgee acquires a good title: *Wilson v. Doster*, 7 Ired. Eq. 231. The statement in *Ford v. Russell*, 1 Freem. Ch. 42, that an executor, as such, has no power to pledge the estate of his testator for a loan of money is not the common-law rule as enunciated by the great weight of authority: See *Carter v. Manufacturers’ Nat. Bank*, 71 Me. 448, 36 Am. Rep. 338. But an executor cannot mortgage a leasehold interest of the testator in order to raise money to repair the property, where the leases do not contain repairing covenants: *Ricketts v. Lewis*, L. R. 20 Ch. D. 745. The pledge or mortgage must be to secure a debt against the estate: *Pickens v. Yarborough*, 26 Ala. 417, 62 Am. Dec. 728. He has no power to make a valid pledge as security for, or in payment of, his own personal debt: *Williamson v. Branch Bank*, 7 Ala. 906, 42 Am.

Dec. 617; *Smith v. Ayer*, 101 U. S. 320. Yet if an executor borrows money, securing it by a pledge of personal property belonging to the estate, and upon his statement that the loan was for the purposes of the estate, the pledge is valid, the loan having been made in good faith: *Carter v. Manufacturers' Nat. Bank*, 71 Me. 448, 36 Am. Rep. 838; *Hemmy v. Hawkins*, 102 Wis. 56, 72 Am. St. Rep. 863. The executor's powers with respect to the sale or pledge of assets are much broader than those of an ordinary trustee, since the executor takes the absolute title to the personal property and is presumed to have the right to transfer: *Hemmy v. Hawkins*, 102 Wis. 56, 72 Am. St. Rep. 863. His authority was well expressed in *Smith v. Ayer*, 101 U. S. 320, as follows: "There is no doubt that, unless restrained by statute, an executor can dispose of the personal assets of his testator by sale or pledge for all purposes connected with the discharge of his duties under the will. And even where the sale or pledge is made for other purposes, of which the purchaser or pledgee has no knowledge or notice, but takes the property in good faith, the transaction will be sustained; for the purchaser or pledgee is not bound to see to the disposition of the proceeds received. But the case is otherwise where the purchaser or pledgee has knowledge of the perversion of the property to other purposes than those of the estate, or the intended perversion of the proceeds."

Paying Debts.—One of the chief duties devolving on an executor is that of paying the debts of the estate. He, therefore, has power to pay all claims of this character against the estate. He cannot, however, pay debts not of a preferred class before the other debts are paid. And if he attempts to do so and the estate proves insufficient, he is not entitled to any credit therefor on the settlement of his account: *Jackson v. Wood*, 108 Ala. 209. The payment of one debt before another which is preferred is done at his peril: *Pryor v. Davis*, 109 Ala. 117; *Cunningham v. Cunningham*, 94 Ind. 557; *Place v. Oldham*, 10 B. Mon. 400; *Evans v. Taylor*, 60 Tex. 422. And it seems that an honest mistake as to the priority of debts is no valid excuse for paying a debt out of its order: *Moye v. Albritton*, 7 Ired. Eq. 62. An executor or administrator should not pay legacies prior to the payment of debts, and he is personally liable for any deficiency which results from such a payment: *McIntosh v. Hambleton*, 35 Ga. 94, 89 Am. Dec. 276; *Thrash v. Sumwalt*, 5 Ala. 13; *Handley v. Heflin*, 84 Ala. 600; *Fleece v. Jones*, 71 Ind. 340; *Bank v. McIntire*, 40 Ohio St. 528; *McKinder v. Littlejohn*, 1 Ired. 66; *Lewis v. Mason*, 84 Va. 731. He may render himself liable by such payment though he was ignorant of the existence of any debts: *Lewis v. Overby*, 81 Gratt. 601. As to debts of the same class, an executor has authority to prefer one above another. This is the common-law rule, but has been changed almost everywhere in this country: *Gay v. Lemle*, 32 Miss. 309; *Neal v. Baker*, 2 N. H. 477. An executor may retain assets of the estate in payment of a debt due himself: *Page v. Patton*, 5 Pet. 304; *Kirksey v. Kirksey*, 41 Ala.

626; *Nelson v. Russell*, 15 Mo. 356; *Chesson v. Chesson*, 8 Ired. Eq. 141.

The mere receipt by an executor of assets of the estate sufficient to satisfy his debt due from the testator has been stated to operate, at common law, as an extinguishment of his demand: *Sealey v. Thomas*, 6 Fla. 25. This is not true, however, in every case, though it may be if the assets are sufficient. But the executor can exercise the right of retainer only under certain restrictions. He cannot discharge his own debt in preference to others of superior dignity, though he may prefer his own to others of equal degree: *Page v. Patton*, 5 Pet. 304. And he can retain property with which to pay his own debt even though it is barred by the statute of limitations: *Rogers v. Hosack*, 18 Wend. 819. An earlier case, however, in the same reports—*Rogers v. Rogers*, 8 Wend. 503, 20 Am. Dec. 716—holds that an executor cannot retain the amount of his debt where it is barred by the statute of limitations, since he cannot retain a debt which he could not recover if he stood as creditor simply, and not executor. The true rule might seem to turn upon the authority of an executor to waive the statute of limitations, which will be considered later. The reason why an executor was privileged to retain the amount of his own debt seems to have been because of the apparent absurdity in requiring a person to sue himself: *Page v. Patton*, 5 Pet. 304; *Sanderson v. Sanderson*, 17 Fla. 820, 847.

If an executor pays debts out of their order, and subsequently there proves to be a deficiency, the executor cannot recover from an unpreferred creditor the amount paid to him in violation of the rights of creditors of a higher class: *Walker v. Hill*, 17 Mass. 380; *Brooking v. Farmers' Bank*, 83 Ky. 431; *Lawson v. Hansborough*, 10 B. Mon. 147. The reason being, as stated in *Walker v. Hill*, 17 Mass. 380, "that the only ground on which the executor could demand the repayment would have been a good defense against the original claim, and would have excused him from paying the debt." A different rule seems to prevail with regard to legatees. If there proves to be a deficiency of assets, all the legacies of the same class abate in proportion. "If the executor has paid one legatee in full, and it afterward appears that the assets were originally insufficient to pay all the debts and legacies, that legatee may be compelled to refund for the benefit of the creditors, or of the other legatees, . . . and the executor alone may maintain such a suit": *Walker v. Hill*, 17 Mass. 380.

An executor has authority to satisfy liens and mortgages on personal property, if it is for the benefit of the estate and he has property with which to do it: *Pryor v. Davis*, 109 Ala. 117. He may also pay interest on interest bearing debts, and receive credit for the same in his final account: *Billington's Appeal*, 3 Rawle, 48; *Trotter v. Trotter*, 40 Miss. 704. This also includes the power to pay interest upon a mortgage upon real estate, because the personal

property is the primary fund for the payment of all debts: *Merhel's Estate*, 131 Pa. St. 584.

Arbitration of Claims.—At common law, an executor or administrator had authority to submit to arbitration any claims in favor of or against the estate, and such acts would be upheld if they were fair, beneficial to the estate, and free from fraud, negligence, or misconduct: *Bailey v. Dilworth*, 10 Smedes & M. 404, 48 Am. Dec. 760; *Wood v. Tunnichliff*, 74 N. Y. 38; *Childs v. Updyke*, 9 Ohio St. 333; *Wamsley v. Wamsley*, 26 W. Va. 45; *Chadbourn v. Chadbourn*, 9 Allen, 173; *Parker v. Providence etc. Co.*, 17 R. I. 376, 33 Am. St. Rep. 869; *Bennett v. Pierce*, 28 Conn. 315; *Peter's Appeal*, 88 Pa. St. 239. Such authority sprang from his power to settle all claims due to or from the estate he represents: *Nelson v. Cornwell*, 11 Gratt. 724. It was the administrator or executor, however, who was liable upon the award in such a case, and not the estate, the same as other contracts entered into by him: *Powers v. Douglass*, 53 Vt. 471, 38 Am. Rep. 699. The submission was the executor's own act, and while it would be sustained if the submission was made in good faith and beneficial to the estate, yet it seems that good faith, of itself, was not enough, and the executor, though possessing sufficient power to submit a claim to arbitration, yet, so far as his personal liability was concerned, he proceeded to some extent at his own risk. And if the arbitrators did not award as much as the estate was entitled to at law, it would amount to a devastavit for the residue. Or if an unjust claim was by an arbitration saddled upon the estate, the executor would be liable. It was intimated in *Nelson v. Cornwell*, 11 Gratt. 724, 749, that "it may have been considered unsafe and dangerous to permit an executor or administrator to refer to the final arbitrament of such judges a controversy affecting the estate of his decedent without holding him liable for a devastavit if any injury resulted to the estate from the award." At any rate, the authority was not absolute so far as binding the estate was concerned. In the ordinary course of administration, an executor has full power to voluntarily incur the hazard of submitting a claim to arbitration. But there might arise cases in which a court of equity would enjoin an executor from submitting a claim to arbitration. Hence where the only parties interested in an estate objected to the submission of a claim to arbitration, and the estate was practically settled so that there was no immediate necessity for the arbitration, the beneficiaries were granted an injunction restraining the administrator from submitting the disputed claim to arbitration: *Crum v. Moore*, 14 N. J. Eq. 436, 82 Am. Dec. 262. And the fact that the administrator might be held personally liable for any loss which the estate and the beneficiaries suffered was no defense to the injunction proceedings.

Compromise, Composition, and Release of Claims.—Similarly, executors had, at common law, power to compromise or compound claims in favor of or against the estate: *Parker v. Providence etc.*

Co., 17 R. I. 376, 33 Am. St. Rep. 869; Woolfork v. Sullivan, 23 Ala. 548, 58 Am. Dec. 305; Waring v. Lewis, 53 Ala. 615; Long v. Shackelford, 25 Miss. 559; Moulton v. Holmes, 57 Cal. 337; Short v. Johnson, 25 Ill. 405 (489).

He may compromise a lawsuit, buy the peace of the estate he represents, and extinguish doubtful claims against it, provided he acts discreetly and in good faith: Meeker v. Vanderveer, 15 N. J. L. 392. He may compound with a debtor, and receive less than the amount due the estate, and this without obtaining permission from any court, provided the compromise is judicious and beneficial to the estate: Wyman's Appeal, 13 N. H. 18. This right to compromise extends both to executors and administrators: Buck v. Aikin, 1 Wend. 466, 19 Am. Dec. 535. Since the title to all choses in action and debts due the deceased is in the executor, his power to compromise is the same as if he were the absolute owner. He is limited only by the rule that he can make no improper compromise, which, if he does make, will render him liable as for a devastavit: Van Hoose v. Bush, 54 Ala. 342; Waring v. Lewis, 53 Ala. 615. In like manner an executor may release claims in favor of and against the estate: Waring v. Lewis, 53 Ala. 615; Van Hoose v. Bush, 54 Ala. 342; Sherburne v. Goodwin, 44 N. H. 271. He may, however, render himself liable for devastavit by improperly executing a release: Caldwell v. McVicar, 12 Ark. 746. In making compromises or releases he must act only when the interests of the estate require it and when the estate would be benefited thereby. An executor must act as a discreet and prudent man would act if the debts were his own: Moulton v. Holmes, 57 Cal. 337; Bailey v. Dilworth, 10 Smedes & M. 404, 48 Am. Dec. 760. In Verdler v. Simons, 2 McCord Eq. 385, it was said that to justify an executor in compromising a debt, and giving up a part to save the remainder, "it must be in a clear case of necessity, where great risk would be run of losing all or a great part. unless a compromise be made." The utmost good faith is required of the executor, and the compromise or release, to be upheld, must be fair, beneficial to the estate, and free from fraud, negligence, or misconduct: Bailey v. Dilworth, 10 Smedes & M. 404, 48 Am. Dec. 760; Gullledge v. Berry, 31 Miss. 346; Wyman's Appeal, 13 N. H. 18.

Waiving Statute of Limitations.—It seems to be well settled that in England, at common law, an executor had full power to plead the statute of limitations or not, at his pleasure. He could waive it if he desired: Leigh v. Smith, 3 Ired. Eq. 442, 42 Am. Dec. 182; Pursel v. Pursel, 14 N. J. Eq. 514; Hodgdon v. White, 11 N. H. 208; Stiles v. Smith, 55 Mo. 363; Halliburton v. Carson, 100 N. C. 99, 6 Am. St. Rep. 565; Scott v. Hancock, 13 Mass. 162; Payne v. Pusey, 8 Bush, 564; Batson v. Murrell, 10 Humph. 301, 51 Am. Dec. 707; Estate of Claghorn, 181 Pa. St. 600, 59 Am. St. Rep. 680. In Estate of Smith, 1 Ashm. 352, the court said: "Until this argument, I conceived the law to be indisputable that it was in the discretion of the executor

to plead the statute of limitations or otherwise. The whole current of authority is one way." The whole matter seems to have rested in the discretion of the executor, and if the debt were a just one he could waive the statute: *Fritz v. Thomas*, 1 Whart. 66, 29 Am. Dec. 39. "In all cases he must act in good faith in protecting the trust estate against unjust demands, but not against those that are honest and just. The law does not require of him to make him [the testator] sin in his grave": *Halliburton v. Carson*, 100 N. C. 99, 6 Am. St. Rep. 565. In *Pollard v. Sceaux*, 28 Ala. 484, 65 Am. Dec. 364, it was said that an administrator could waive the statute of limitations if the personal assets in his hands were sufficient to pay all the debts; but that the rule was different where such assets were insufficient. If the debt is due to the executor himself, and was barred before administration, it seems that he has no power to waive the statute in favor of himself: *Batson v. Murrell*, 10 Humph. 801, 51 Am. Dec. 707. Contra, see *Semmes v. Magruder*, 10 Md. 242. And a debt which has been declared by a court to be barred cannot be paid by an executor without being guilty of a *devastavit*: *Midgley v. Midgley*, [1893] 3 Ch. 282.

The common-law rule as it existed in England has not been universally followed in this country, however, and in some jurisdictions the right to waive the statute of limitations is denied: *Patterson v. Cobb*, 4 Fla. 481; *Butler v. Johnson*, 111 N. Y. 204; *Van Winkle v. Blackford*, 33 W. Va. 573; *Smith v. Pattie*, 81 Va. 654. In some cases a distinction has been drawn between claims barred prior to the death of the testator and those not barred until after the executor had taken charge of the estate. In the former case the statute of limitations cannot be waived; in the latter the right to waive it rests in the discretion of the executor: *Byrd v. Wells*, 40 Miss. 711; *Rogers v. Wilson*, 13 Ark. 507.

There is a radical difference between the mere waiver of the statute when sued upon a claim against the estate, and a new special promise made for the purpose of taking the claim out of the statute. The executor cannot generally enter into a contract which will be binding on the estate, though it may bind him personally. Hence it has been held that he has no authority to make a contract not to plead the statute of limitations. While he is not bound to plead the statute, "because he may know the debt to be a just one, and for that reason only. the matter is left to his discretion; but it follows not, that he may tie up his hands from using it, when the time comes, by a mistaken concession": *Fritz v. Thomas*, 1 Whart. 66, 29 Am. Dec. 39; *Estate of Claghorn*, 181 Pa. St. 600, 59 Am. St. Rep. 680. The authority to take an indebtedness out of the statute of limitations by means of a new promise is dependent upon the power to make a new contract. And since an executor, ordinarily, has no power to bind the estate by a contract, he cannot promise to waive the statute so as to make it binding in a suit against the estate: *Cape Girardeau County v. Harbison*, 58

Mo. 90. See *Patterson v. Cobb*, 4 Fla. 481; *Moore v. Hillebrant*, 14 Tex. 312, 65 Am. Dec. 118; *Peck v. Botsford*, 7 Conn. 172, 18 Am. Dec. 92. The authorities are not uniform even on this question. In England there seems to be little doubt of the power of an executor to promise to pay a barred claim, and such a promise does take the claim out of the operation of the statute of limitations. Probably the weight of authority in this country is in harmony with this rule, and recognizes the common-law power of an executor to promise to waive the statute of limitations. It was said in *Emerson v. Thompson*, 16 Mass. 429, that the rule was well settled that, if the debt was justly due, an executor or administrator could either omit or refuse to plead the statute or he could make a new promise which would remove the barrier of the statute. This case and others is criticised in *Henderson v. Ilsley*, 11 Smedes & M. 9, 49 Am. Dec. 41, where a contrary doctrine was announced, and the court held that an executor could make no promise which would take a case out of the statute, whether the bar was complete prior to the testator's death or not. That a debt barred by the statute can be revived by an acknowledgment by an executor, see *Northcut v. Wilkinson*, 12 B. Mon. 408; *Quynn v. Carroll*, 10 Md. 197. Part payment will operate to take a claim out of the operation of the statute: *Semmes v. Magruder*, 10 Md. 242. It is probable that an executor may interrupt the running of the statute where the debt is not yet barred: *Patterson v. Cobb*, 4 Fla. 482.

What has been said heretofore relates solely to general statutes of limitation. In many of the states there exist special statutes of limitation which require creditors to present their claims against the estate within a certain specified time, and that claims against the estate can be enforced only within a certain time. These statutes are passed not only for the benefit of the executor, but for that of heirs and devisees, in order to discharge their estates from the lien of the debts of the deceased. Hence it is held that an executor has no authority to waive the bar arising from these special statutes of limitation: *Emerson v. Thompson*, 16 Mass. 429; *Stiles v. Smith*, 55 Mo. 363. Such statutes are intended to insure the speedy settlement of estates, and cannot be waived: *Amoskeag Mfg. Co. v. Barnes*, 48 N. H. 25.

Collection of Debts.—One of the chief powers and duties of an executor is to collect debts due to the estate. And this power continues until the estate is finally settled and closed: *Brannock v. Stocker*, 76 Ind. 573; *Keane v. Goldsmith*, 14 La. Ann. 349. To enable him to collect the debts he is authorized to sue for their recovery, and ordinarily he has the exclusive right to pursue this remedy: *Worsham v. Field*, 18 Ark. 447; *Walpole v. Bishop*, 31 Ind. 156; *Kaminer v. Hope*, 9 S. C. 253; *Moore v. Morse*, 2 Tex. 400; *Drury v. Natick*, 10 Allen, 169. Ordinarily, he should sue within a reasonable time: *Morris v. Morris*, 9 Helsk. 814. In exercising his powers relative to the collection of debts, an executor may extend

the time of payment: *Underwood v. Sample*, 70 Ind. 446; *Campbell v. Linder*, 50 S. C. 169. Certainly, if the debt is doubtful, he may extend the time of payment and thus render it safe: *Berry v. Parke*, 8 Smedes & M. 625. Those cases in which the power to extend the time of payment without the authority of a court is denied are based upon statutory modifications of the common-law rule: *Mad-dock v. Russell*, 109 Cal. 417.

Ordinarily, an executor is required to collect the debts due the estate in money, where the debtor is solvent: *Parham v. Stith*, 56 Miss. 465. Accordingly, it has been held that an executor cannot take property in payment of a debt due the estate from a debtor who is perfectly solvent: *Gulledge v. Berry*, 31 Miss. 346; *Weir v. Tate*, 4 Ired. Eq. 264. See, also, *Allison v. Graham*, 67 Iowa, 68. In order to save a debt due the estate an executor has authority to take property in payment. Hence where a debt due the estate is secured by a mortgage, the executor may, upon a foreclosure of the mortgage, purchase the land and hold it for the benefit of the estate, this being necessary to preserve the estate from loss: *Dusing v. Nelson*, 7 Colo. 184; *Hughes v. Hatchett*, 55 Ala. 539; *Clark v. Clark*, 8 Paige, 152, 35 Am. Dec. 676; *Holcomb v. Holcomb*, 11 N. J. Eq. 281. Similarly, it has been held that where a debtor is embarrassed so that the unsecured debt cannot probably be collected, and the debtor refuses to give any security without a further advance, an administrator may make a further loan to the debtor and take a mortgage to cover the entire debt: *Torrence v. Davidson*, 92 N. C. 437, 53 Am. Rep. 419. An administrator or executor may take a chattel mortgage from an insolvent debtor to secure the estate against loss: *Walling v. Lewis*, 119 Ind. 496. In *Biscoe v. Moore*, 12 Ark. 77, an administrator was said to have authority to take a note for a debt due his intestate. It seems, however, that there should be some good reason why anything but money is taken in payment of a debt. If the exigencies of the estate require it, a debt may be sold or exchanged for the note of a third person: *Stribling v. Coal Co.*, 31 W. Va. 82. But if the executor takes a note from a solvent debtor, as conditional payment, "he assumes individually the responsibility of such a transaction, and has no discretion or power to impose on the estate the risks incident to his laches in respect of such paper, and the debtor is not thereby discharged from his obligation to the estate": *Parham v. Stith*, 56 Miss. 465.

Although an executor should be paid in money, yet he may receive anything which the law declares to be lawful currency and a legal tender in the payment of debts, such as treasury notes: *Jackson v. Chase*, 98 Mass. 286. He may collect debts in bank paper not strictly at par, when the best interests of the estate require it, and when nothing better can be done. But such funds should be converted into something less perishable, in a reasonable time and with as little delay as possible: *Bailey v. Dilworth*, 10

Smedes & M. 404, 48 Am. Dec. 760. The right to take depreciated currency in payment of debts depends upon the necessities of the estate and the possibility of collecting the debts in anything better. Thus in *Koon v. Munro*, 11 S. O. 139, it was held that an administrator during the Civil War could receive confederate money at its nominal value, where the money was needed to defray the current expenses of administration and to pay outstanding debts, or there was danger of losing the unsecured debt if not collected in this manner, or it was to be used to pay a legatee with his consent. But an executor cannot receive depreciated currency in payment of a debt which by its terms is payable in gold and well secured: *Tosh v. Robertson*, 27 Gratt. 270. See, further, *Depriest v. Patterson*, 92 N. C. 402; *Ivey v. Coleman*, 42 Ala. 409.

Promissory notes are part of the personal estate of the testator, over which the executor has absolute control: *Crist v. Crist*, 1 Ind. 570, 50 Am. Dec. 481. He may transfer them by indorsement and delivery: *Mackay v. St. Mary's Church*, 15 R. I. 121, 2 Am. St. Rep. 881. Ordinarily, they should not be sold, the interests of the estate being promoted more by their collection rather than by their sale: *Lappin v. Mumford*, 14 Kan. 9; *Beecher v. Buckingham*, 18 Conn. 110, 44 Am. Dec. 580. The duty of an executor is to collect the debts, not to sell them: *Trevelyan v. Lofft*, 83 Va. 141. But this does not lessen his power to sell them. Such notes are personal property the same as any other, and he can dispose of it at his pleasure, subject only to any liability he may incur by reason of an unfaithful execution of his trust: *Beecher v. Buckingham*, 18 Conn. 110, 44 Am. Dec. 580; *Lappin v. Mumford*, 14 Kan. 9. The condition of the estate may require a sale, and if in the exercise of his best judgment, acting with ordinary prudence, and in the honest belief that the interests of the estate require it, he makes a sale, it will be approved: *Trevelyan v. Lofft*, 83 Va. 141. But an executor has no authority to transfer a note due the estate for the purpose of paying a debt of his own, and an assignee with notice has no right to recover on such note: *Scott v. Searles*, 7 *Smedes & M.* 408, 45 Am. Dec. 317. The title to a note being vested in an executor or administrator, he may collect it, sell it, or otherwise dispose of it, though if he disposes of it improperly he may render himself liable: *Hough v. Bailey*, 32 Conn. 288; *Walker v. Craig*, 18 Ill. 116; *Speelman v. Culbertson*, 15 Ind. 441; *Wilson v. Doster*, 7 Ired. Eq. 231; *Polk v. Robinson*, 7 Ired. Eq. 235.

Power to Sell Personal Assets.—As already seen, an executor has the power to sell absolutely all the personal property of his testator. The legal title to this property vests in him, and he is clothed with full power of disposition, subject only to the faithful execution of his trust with respect to such property: *Beecher v. Buckingham*, 18 Conn. 110, 44 Am. Dec. 580; *Sneed v. Hooper*, *Ooke*, 200, 5 Am. Dec. 691; *Carter v. Manufacturers' Nat. Bank*, 71 Me. 448, 36 Am. Rep. 338; *Citizens' St. Ry. Co. v. Robbins*, 128

Ind. 449, 25 Am. St. Rep. 445. His power to dispose of such property is so absolute that it cannot be followed by creditors or legatees into the hands of an alienee: *Petersen v. Chemical Bank*, 82 N. Y. 21, 88 Am. Dec. 298; and he could even make a gift of the personal property at law, though he would render himself liable to the estate for such misuse of its funds, and in equity such assets might be followed into other hands, when there had been collusion: *Sneed v. Hooper*, Cooke, 200, 5 Am. Dec. 691. No order of court was required before he could sell the personal assets: *Jelke v. Goldsmith*, 52 Ohio St. 499, 49 Am. St. Rep. 730. Indeed, the power of a court to order an executor or administrator to sell personalty, did not exist at common law, since the executor or administrator had full power in this respect: *Wyatt v. Rambo*, 29 Ala. 510, 68 Am. Dec. 89; *Harth v. Heddlestone*, 2 Bay, 321; *Morrill v. Carr*, 2 La. Ann. 807. An executor can sell, and usually does sell, personalty to satisfy claims against the estate: *Parker v. Daughtry*, 111 Ala. 529; *Morrill v. Carr*, 2 La. Ann. 807. And he is not required to wait for a judgment to be had against him for a debt justly due, to make valid the title of a purchaser of property sold to satisfy such debt: *Smith v. Pollard*, 4 B. Mon. 69. It is probable that originally, in England, an executor might dispose of the personal assets in satisfaction of his own private debt, and such alienation would be good at law, though in equity such property might, under certain circumstances, be followed, and the executor would be liable for a *devastavit*: *Allender v. Riston*, 2 Gill & J. 86. In this country the doctrine recognized in equity seems to have always prevailed, and an executor has no right to dispose of the assets of the estate in satisfaction of his own debt, and one who purchases under such circumstances, with knowledge of the trust, does so at his peril: *Graff v. Castleman*, 5 Rand. 195, 16 Am. Dec. 741; *Williamson v. Branch Bank*, 7 Ala. 906, 42 Am. Dec. 617; *Colt v. Lasnier*, 9 Cow. 320; *Miller v. Williamson*, 5 Md. 219.

As previously noticed, executors may dispose of the chattels real of their testators: *Seers v. Hind*, 1 Ves. Jr. 295; *Taylor v. Hawkins*, 8 Ves. Jr. 209. This last case is authority for the proposition that where property is specifically bequeathed to an executor, he may assign it as security for his own debt, providing there is no collusion.

In a sale of personal property by an executor or administrator, there is no implied warranty either of title or soundness. The maxim *caveat emptor* applies to such sales: *Thompson v. Munger*, 15 Tex. 523, 65 Am. Dec. 176; *Lynch v. Baxter*, 4 Tex. 431, 51 Am. Dec. 735; *Pool v. Hodnett*, 18 Ala. 752; *Bingham v. Maxcy*, 15 Ill. 295; *Joslin v. Oaughlin*, 26 Miss. 134. The cases frequently intimate that an executor can make an express warranty of the personalty which he sells: See *Pool v. Hodnett*, 18 Ala. 752. There would appear to be no difference between an express warranty and any other contract made by an executor with reference to the

estate. As will be seen later, an executor may have the power to enter into a contract and yet not be able to bind the estate by such contract. The agreement binds him personally, but it goes no further. This would seem to be the correct rule with respect to express warranties. Accordingly, it has been held that an executor has no power to bind the estate by warranty, though he may, if he chooses, bind himself by a personal obligation of this kind: *Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399; *Ray v. Virgin*, 12 Ill. 216; *Hutchins v. Brooks*, 31 Miss. 430; *Westfall v. Dungan*, 14 Ohio St. 276; *Stoudenmeier v. Williamson*, 29 Ala. 558. There can be no doubt that an executor can warrant the soundness or title of personal property which he sells, and bind himself personally by such contract. Whether such warranty is binding on the estate is doubtful. The case of *Craddock v. Stewart*, 6 Ala. 77, would seem to support the contention that such a contract was binding on the estate. It was here said that an executor "may sell, pledge, or mortgage them [personal assets], and that this power is necessary, to enable him to perform his duty in paying debts, etc. Such were the powers of an executor or administrator at the common law, and we think it clearly inferable that it was competent for him to warrant either the title or soundness of property of the deceased which he disposed of; and if the transaction, as between the vendee and himself, was fair and bona fide, it would be obligatory upon the estate." In *Stoudenmeier v. Williamson*, 29 Ala. 558, this case was cited to the point that an administrator may bind himself personally by such a contract. But in *Boltwood v. Miller*, 112 Mich. 657, the same case was cited with approval, and apparently to sustain the doctrine that an administrator could bind the estate by an express warranty of soundness. In either event, however, there is no doubt of the power of an executor or administrator to expressly warrant the title or soundness of personal property sold by him. He certainly binds himself by such a contract, and this would seem to be the extent of such a contract, though the two cases cited above would indicate that he had power to bind the estate.

As to the manner of sale, an executor was limited only by his discretion: *Wier v. Davis*, 4 Ala. 442. He can sell at either public or private sale, whichever he may deem for the best interests of the estate, and in doing so he incurs no liability beyond accounting for the value of the property sold: *Johnson v. Kay*, 8 Humph. 142; *Tyrrell v. Morris*, 1 Dev. & B. Eq. 559; *Wynns v. Alexander*, 2 Dev. & B. Eq. 58; *Drake v. Cloonan*, 99 Mich. 121, 41 Am. St. Rep. 586.

Generally speaking, an executor, upon a sale of the testator's property, can receive nothing but money in payment: *Chandler v. Schoonover*, 14 Ind. 324. We have already seen that an executor should collect the debts due the estate in cash, and can receive property therefor, only when the best interests of the estate require

it. But there seems to have been no absolute rule that required an executor to sell for cash only. The law gave no specific directions as to the kind of funds an executor should receive; hence, he was necessarily intrusted with a sound discretion in this regard. He must act with that care and prudence which characterizes an ordinarily prudent man in managing his own business. If he exercised this fidelity and diligence, he would not render himself liable: *Bradshaw v. Cruise*, 4 Heisk. 260. Hence, where a factor sold property for an executor on a few days' credit, in the usual way of business, he is not liable for a resulting loss if the purchaser fails: *Taveau v. Ball*, 1 McCord Eq. 456. Ordinarily, a sale on credit is permissible only when adequate security is taken: *Mickle v. Brown*, 4 Baxt. 468; *English v. Horn*, 102 Ga. 770. An executor is *prima facie* liable for the amount for which the property sold, immediately on its sale. And if he fails to collect the purchase price he is liable, unless he shows that such failure was not due to any fault on his part. In England the rule seems to be even more strict, an executor being immediately chargeable with the price of property sold: *Johnston's Estate*, 9 Watts & S. 107; *Southall v. Taylor*, 14 Gratt. 269, 284.

Purchasing the Property of the Estate.—An executor occupies the position of a trustee with respect to the testator's personal property which has come to his possession, and for this reason he is not permitted to purchase, at his own sale, any of the trust property: *Pearson v. Moreland*, 7 Smedes & M. 609, 45 Am. Dec. 319; *Lockwood v. Mills*, 39 Ill. 602; *Wright v. Campbell*, 27 Ark. 637. It has even been said that such a purchase could not be made even if the sale was public, necessary, fair, and for a full price: *Ryden v. Jones*, 1 Hawks, 497, 9 Am. Dec. 660; *Green v. Sargeant*, 23 Vt. 466, 56 Am. Dec. 88. However, a contrary rule has been held, and a purchase of personalty by an administrator at his own sale has been sustained where the sale was fair and without fraud, and full price was paid for the property: *Stallings v. Foreman*, 2 Hill Eq. 401. And see *McKey v. Young*, 4 Hen. & M. 430. The better doctrine, however, would seem to condemn purchases by an executor. But such condemnation appears not to have rendered the sale void. At law, at least, it was *prima facie* valid: *Lockwood v. Mills*, 39 Ill. 602; *Brannan v. Oliver*, 2 Stew. 47, 19 Am. Dec. 37; *Blount v. Davis*, 2 Dev. 19. And would be supported if no unfairness appeared: *McLane v. Spence*, 6 Ala. 894. In order to avoid it at common law, fraud must have accompanied the sale: *Yeackel v. Litchfield*, 13 Allen, 417, 90 Am. Dec. 207. In equity the purchase by him was considered voidable at the option of any party interested in the estate: *Houston v. Bryan*, 78 Ga. 181, 6 Am. St. Rep. 252; *Pearson v. Moreland*, 7 Smedes & M. 609, 45 Am. Dec. 319; *Buckles v. Lafferty*, 2 Rob. (Va.) 292, 40 Am. Dec. 752. At law, the legal title passed to the executor if he did purchase at his own sale, but

in equity the sale could be set aside: *Boyd v. Blankman*, 29 Cal. 19, 87 Am. Dec. 146. The sale, however, was good until repudiated by the interested parties and set aside in their favor: *Mercer v. Newsom*, 23 Ga. 151. And instead of repudiating the sale, it might subsequently be ratified: *Dunlap v. Mitchell*, 10 Ohio, 118; *Yeackel v. Litchfield*, 18 Allen, 417, 90 Am. Dec. 207. An executor may, it seems, purchase the personal property of the estate if the heirs and those interested therein give their consent, they having a full knowledge of the condition of the estate and the value of the property: *Lyon v. Lyon*, 8 Ired. Eq. 201. See *Tayloe v. Tayloe*, 108 N. C. 69. An executor may also purchase at his own sale where he has a personal interest in the property, and it is necessary to bid it in in order to protect such interest: *Froneberger v. Lewis*, 79 N. C. 426.

Carrying on Decedent's Business.—Ordinarily, an executor has no authority to use the property of the estate to engage in trade or business, though in so doing he believes he is acting for the best interests of the estate. Contracts made by him in connection with the conduct of a business will bind him personally and not the estate: *Matter of Sharp*, 5 Dem. Surr. 516; *Griffin v. Bland*, 43 Ala. 542; *Lucht v. Behrens*, 28 Ohio St. 231, 22 Am. Rep. 378; *Callaghan v. Hall*, 1 Serg. & R. 241. And he can be called upon to account for any profits he may make: *McKnight v. Walsh*, 23 N. J. Eq. 136. Neither can an executor continue to carry on the business of the deceased: *Field v. Colton*, 7 Ill. App. 379; *Tompkins v. Weeks*, 26 Cal. 50; *Hooper v. Hooper*, 29 W. Va. 276; *Succession of Sparrow*, 39 La. Ann. 696; *Lucht v. Behrens*, 28 Ohio St. 231, 22 Am. Rep. 378. If he attempts to carry on the business with the surviving partners of the deceased, the executor becomes a co-partner, and is liable personally for the debts of the company: *Alsop v. Mather*, 8 Conn. 584, 21 Am. Dec. 703. And the estate is not liable for money borrowed by the executor for, and used in carrying on, such trade and business, though the executor acted in good faith: *Lucht v. Behrens*, 28 Ohio St. 231, 22 Am. Rep. 378. An executor represents the deceased only so far as is necessary to wind up and close his business. The carrying on of a trade is not transmitted to him. All the rules applicable to carrying on a trade apply with full force to the carrying on of a farm or plantation. Even more reason existed at common law, because the land descended to the heirs and an executor or administrator had no control whatever over it: *Steele v. Knox*, 10 Ala. 608; *Succession of Sparrow*, 39 La. Ann. 696; *Hallock v. Smith*, 50 Conn. 127. If authorized by the will or by the court, an executor could carry on the decedent's business: *Lucht v. Behrens*, 28 Ohio St. 231, 22 Am. Rep. 378. Also if the articles of copartnership of the partnership to which the decedent belonged contained a covenant to that effect: *Laughlin v. Lorenz*, 48 Pa. St. 275, 86 Am. Dec. 592. ▲

distinction has been drawn between the carrying on of the decedent's business as such, and merely continuing it for the sole purpose of closing it out to the best interests of the estate. An executor is not bound to convert into money the assets of the estate involved in trade immediately upon the death of the testator. The estate may require that the business shall be carried on to some extent in order to properly dispose of it. In such a case it has been said that "he was at liberty, within reasonable limits, to make purchases and to incur liabilities, if, under the circumstances then existing, that course seemed to be demanded by the best interests of the estate": *Matter of Sharp*, 5 Dem. Surr. 516. Hence, where the decedent was a merchant and left a stock of goods in a retail store, it was held proper for the executor to employ a clerk to sell the goods instead of resorting to a forced sale: *Cornwell v. Deck*, 2 Redf. 87. And where a testatrix was the principal of a female seminary, under certain contracts for the education of her pupils, the executor was held to have acted within the scope of his authority when he kept the institution running until the close of the school year, and the loss resulting was deemed a proper charge on the estate: *Gilman v. Wilber*, 1 Dem. Surr. 547. And in *Pitts v. Jameson*, 15 Barb. 310, it was held a proper exercise of discretion for personal representatives to complete the manufacture of certain machines which had been begun by the intestate in his lifetime and remaining unfinished at his death. So in *Newton v. Poole*, 12 Leigh, 112, where the testator left unfinished bricks as part of his estate, his wife, as executrix, was held to have acted within her powers in completing the bricks after his death; See also, *Estate of Vida*, 1 Hawaiian Rep. 89; *Vandegraaff v. Medlock*, 3 Port. 389, 29 Am. Dec. 256; *Thompson v. Brown*, 4 Johns. Ch. 619.

Investments.—An executor has no authority to speculate on the testator's estate: *Kellar v. Beelor*, 5 T. B. Mon. 574. Under ordinary circumstances, he has no authority to invest the property belonging to the estate. He is a trustee for the collection and distribution of assets, and not for their investment: *Charlton's Appeal*, 34 Pa. St. 473, 75 Am. Dec. 673. At an early date in England it is very probable that an executor could not invest the funds of the estate: *Ratcliffe v. Graves*, 1 Vern. 197; *Adams v. Gale*, 2 Atk. 106. As was well said in *Guthrie v. Wheeler*, 51 Conn. 207, "the safest and therefore the best investment a man can make is to pay his debts, and especially is this true of an estate in process of settlement." In *State v. Johnson*, 7 Blackf. 529, it was considered a diversion of the assets from their proper use, where money was loaned while there were debts to pay. An executor is but a temporary custodian of the estate, holding the funds for the payment of debts and for distribution. For this reason an executor has ordinarily no power to invest the decedent's estate: *Candee v. Skinner*, 40 Conn. 464; *Wadsworth v. Connell*, 104 Ill. 369; *Gerald*:

v. Bunkley, 17 Ala. 170. As was said in Jennings v. Davis, 5 Dana, 127, executors "are required to pay the debts and distribute the surplus among the legatees or distributees as soon as may be. It is no part of their duty to lend it out, or to invest it in securities, and they are not responsible if they fail to do so. Nor is it any part of their duty to make profit out of the distributable funds in their hands. But their duty is always to hold it ready to pay over to those entitled, as the law directs." An executor is exercising proper care when he deposits money of the estate in a bank: Sheerin v. Public Administrator, 2 Redf. 421. Certainly, he can so deposit current collections of income: Barney v. Saunders, 16 How. 535; Guthrie v. Wheeler, 51 Conn. 207. And where the decedent kept a part of his money on deposit in a bank in another state, the executor may continue to use such bank as a place of deposit: Moore v. Eure, 101 N. C. 11, 9 Am. St. Rep. 17. However, where money of the estate is likely to lie idle in their hands for some time, executors have authority to invest it for the benefit of the estate. Indeed, it is their duty to invest it, and they will be held liable for interest if it is not invested: Dunscomb v. Dunscomb, 1 Johns. Ch. 508, 7 Am. Dec. 504; Frey v. Demarest, 17 N. J. Eq. 71; Chase v. Lockerman, 11 Gill & J. 185, 35 Am. Dec. 277; Eppinger v. Canepa, 20 Fla. 262; Davis v. Wright, 2 Hill (S. C.), 560. If he has funds in his hands which cannot be paid to the parties entitled thereto, an executor has both the power and it is his duty to properly invest them: Leake v. Leake, 75 Va. 792.

While an executor has power to make investments when the funds of the estate are not required for use in other directions, the character of his investments are somewhat limited. An executor, it seems, has always had the authority to invest in government securities: Gray v. Fox, 1 N. J. Eq. 259, 22 Am. Dec. 508; Ormiston v. Olcott, 84 N. Y. 339. At one time in England it appears that an executor could invest in no other class of securities without rendering himself liable for any loss which might result: 3 Williams on Executors, 1710. But the rule is less strict now, and in this country his power has always extended both to government and state securities, and to bonds and mortgages on unencumbered real estate. And this seems to represent the general extent of his power: Mills v. Hoffman, 26 Hun, 594; Gray v. Fox, 1 N. J. Eq. 259, 22 Am. Dec. 508; King v. Talbot, 40 N. Y. 76; Ackerman v. Emott, 4 Barb. 626. But he cannot purchase real estate outright for the purpose of an investment: Baker v. Disbrow, 3 Redf. 348. Even if authority is given by the will to invest in productive real estate, he is not authorized to purchase vacant lots and improve them: Holcomb v. Holcomb, 11 N. J. Eq. 281. This want of power to buy land as an investment does not prevent the legal title from passing to the executor so that he can convey a good title free from the claim of distributees. The want of power merely affects his personal liability: Richardson v. McLemore, 60 Miss. 315. The

authority to invest in real estate securities does not confer power to invest in lands outside of the state. And in the absence of some great necessity or of a very pressing emergency, such an investment will not be upheld as a general rule, because the trust fund is beyond the jurisdiction of the courts of the state, and is subject to other laws and the risk and inconvenience of distance and of foreign tribunals: *Ormiston v. Olcott*, 84 N. Y. 339.

Formerly, in England, an executor was allowed to loan the funds of the estate upon personal security. But this rule has long since been abrogated, and has never prevailed in this country. Personal security is not usually a safe investment for an executor to make, and will not be upheld: *Gray v. Fox*, 1 N. J. Eq. 259, 22 Am. Dec. 508; *Wilson's Appeal*, 115 Pa. St. 95; *Nyce's Estate*, 5 Watts & S. 254, 40 Am. Dec. 498. The corporate stock of private corporations is treated as personal security in England and in some of the states of this country. Hence, it is held to be a violation of his duty and the obligations of his trust for an executor to invest the funds of the estate in canal, bank, insurance, railroad, or other stocks of private corporations: *King v. Talbot*, 40 N. Y. 76. In *Nyce's Estate*, 5 Watts & S. 254, 40 Am. Dec. 498, United States bank stock was held to be an improper investment for an executor to make, little, if any, better than mere personal security of an individual. To the same effect see *Leitch v. Wells*, 48 N. Y. 585; *Gray v. Fox*, 1 N. J. Eq. 259, 22 Am. Dec. 508; *Gilbert v. Welsch*, 75 Ind. 557. On the other hand, in some of the states executors have power to invest in the stock of private corporations, and will be protected if they do so invest the funds of the estate: *Harvard College v. Amory*, 9 Pick. 446; *Brown v. French*, 125 Mass. 410, 28 Am. Rep. 254; *McCoy v. Horwitz*, 62 Md. 183; *Peckham v. Newton*, 15 R. I. 321; *Smyth v. Burns*, 25 Miss. 422. While most of these cases arose under wills in which the executors were permitted to use their discretion in making investments, it is probable that the same rule would be adopted even in the absence of any direction in the will.

As to investments made by the decedent himself during his life, the executor has authority to look after them, and it is his duty to act with reference to such securities so that the estate will not suffer loss: *Matter of Butler*, 1 Connoly, 58. He should act as a prudent man would in regard to his own affairs: *McCabe v. Fowler*, 84 N. Y. 314. If the securities held by a testator are unauthorized—that is, if they are securities which the executor himself could not purchase—he must sell them as soon as possible, and invest the funds in that which the law permits. An executor has no authority to retain doubtful securities. Hence, where the assets of an estate consisted of shares of stock of private corporations, the executor must sell them and properly reinvest the funds realized from the sale: *Gillespie v. Brooks*, 2 Redf. 349. Executors must, within a reasonable time after the testator's death, convert into

money outstanding investments which are not deemed secure in the eye of the law: *Lacey v. Davis*, 4 Redf. 402; *Judd v. Warner*, 2 Dem. Surr. 104; *Ward v. Kitchen*, 30 N. J. Eq. 31. Whatever securities are authorized and sanctioned by law as safe may be retained where made by a testator: *Ward v. Kitchen*, 30 N. J. Eq. 31; *Pope v. Mathews*, 18 S. O. 444. Hence, where stocks in private corporations are recognized as a valid investment, an executor may retain similar investments made by his testator. And if he exercises proper care and discretion in looking after such investments, he is not liable for a loss due to their depreciation: *Bowker v. Pierce*, 130 Mass. 262; *Stewart's Appeal*, 110 Pa. St. 410; *Grinnell v. Baker*, 17 R. I. 41.

Executory Contracts of Decedent.—An executor has power to perform the ordinary executory contracts of his testator. As to such contracts he takes the place of the intestate. It is his duty to discharge them in the mode pointed out by law: *Woods v. Ridley*, 27 Miss. 119; *Janin v. Browne*, 59 Cal. 37; *Smith v. Wilmington etc. Mfg. Co.*, 83 Ill. 498. While he can perform his contracts, he has no power to complete his proposals: *Phipps v. Jones*, 20 Pa. St. 260, 59 Am. Dec. 708. Neither is he capable of enlarging any contract entered into by the decedent: *Woods v. Ridley*, 27 Miss. 119. The general test as to his power to perform contracts is whether he can fairly and sufficiently execute all the deceased could have done. If he can, then he has authority to execute the contracts, and he may be compelled to do so: *Janin v. Browne*, 59 Cal. 37; *McCann v. Pennie*, 100 Cal. 547; *Smith v. Wilmington etc. Mfg. Co.*, 83 Ill. 498. Hence, covenants in a lease are, after the lessee's death, binding on his executor, and may be performed by him: *Winston v. Franklin Academy*, 28 Miss. 118, 61 Am. Dec. 540. This will include a covenant to pay for certain buildings erected on the land: *Jackson v. O'Brannin*, 14 Ohio St. 177; and in fact all covenants except such as must be performed by the testator in person: *Petrie v. Voorhees*, 18 N. J. Eq. 285. And where a testator had sold timber which was cut and lying upon the land, a part only of which had been delivered prior to his death, his executor is obliged to complete the contract by delivering the rest of the timber: *Parker v. Barlow*, 93 Ga. 700. Contracts for the erection of buildings are among those which an executor may perform: *Russell v. Buckhout*, 87 Hun, 46; *Bambrick v. Webster etc. Assn.*, 53 Mo. App. 225; *Janin v. Browne*, 59 Cal. 37; *Pringle v. McPherson*, 2 Desaus. 524. But an executor cannot bind the estate by a new contract for the completion of a building, for the erection of which the testator had contracted: *Chicago etc. Lumber Co. v. Tomlinson*, 54 Kan. 770. An executor need not be sued before performing the testator's contracts—he may execute them voluntarily: *Denton v. Sanford*, 103 N. Y. 607.

Contracts of a purely personal character, or which require, in their execution, the exercise of peculiar taste or skill, the executor need

not perform: *Smith v. Wilmington etc. Mfg. Co.*, 83 Ill. 498; *Janin v. Browne*, 59 Cal. 37; *Marvel v. Phillips*, 162 Mass. 399, 44 Am. St. Rep. 370; *Shultz v. Johnson*, 5 B. Mon. 497; *Siler v. Gray*, 86 N. C. 566. It seems that where a testator had contracted for the services of another for one year, at stipulated wages, and died soon after, this was not such a personal contract that the executor could not perform it, hence he could retain such other in his employment under the contract where it was necessary for the protection of the estate: *Estate of Miner*, 46 Cal. 564. Where an executor may perform a personal contract of the testator, he has power, in his discretion, to rescind it instead of performing it: *Gray v. Hawkins*, 8 Ohio St. 449, 72 Am. Dec. 600; *Dougherty v. Stephenson*, 20 Pa. St. 210.

New Contracts.—An executor as an individual is not limited with respect to his power to make contracts. He may make any contract he sees fit in the management of the estate, and if it is supported by a valid consideration it will be binding on him personally, and may be enforced against him. Three propositions must be clearly distinguished in considering the powers of an executor to enter into contracts with reference to the estate: 1. As an individual he may bind himself personally by almost any contract which is otherwise valid; 2. He may make any contract which is reasonable and necessary in the management of the estate, and while such contract merely binds him personally, he will be given credit in his account for any expense incurred under such contract; and 3. He has no power to bind the estate by a new contract, and can bind the estate by a contract only in one or two exceptional instances. There is a vast difference between the power of an executor to make a contract which will bind the estate, and his power to contract with reference to the estate for which he can claim credit in his final account. The rule is firmly established that an executor has no power to bind the estate by a new contract: *May v. May*, 7 Fla. 207, 68 Am. Dec. 431; *Pike v. Thomas*, 62 Ark. 223, 54 Am. St. Rep. 292; *Sterrett v. Barker*, 119 Cal. 492; *Sumner v. Williams*, 8 Mass. 162, 5 Am. Dec. 83; *Davis v. French*, 20 Me. 21, 37 Am. Dec. 36; *Smith v. Brennan*, 62 Mich. 349, 4 Am. St. Rep. 867; *Schmittler v. Simon*, 101 N. Y. 554, 54 Am. Rep. 737; *Lucht v. Behrens*, 28 Ohio St. 231, 22 Am. Rep. 378; *Grier v. Huston*, 8 Serg. & R. 402, 11 Am. Dec. 627; *Fitzhugh v. Fitzhugh*, 11 Gratt. 800, 62 Am. Dec. 653. As was said in *McEldery v. McKenzie*, 2 Port. 33, 27 Am. Dec. 643, "that an executor or administrator can, at his discretion, employ workmen, make contracts, give notes and bonds, ad libitum, and bind the estate, is a principle that seems only necessary to be stated to be rejected. That an executor or administrator may contract for all necessary matters relating to an estate cannot be doubted, but he does so on his personal responsibility; and that the action to recover on such contract at law must be against him individually is equally clear."

This is undoubtedly the correct rule, and he has no power to bind the estate by a contract, even though it is for the use and benefit of the estate: *Harding v. Evans*, 3 Port. 221, 29 Am. Dec. 255; *Doolittle v. Willet*, 57 N. J. L. 398; *Lovell v. Field*, 5 Vt. 218; *Underwood v. Milligan*, 10 Ark. 254; *Daily v. Daily*, 66 Ala. 266. His power to contract for all necessary matters relating to the estate is unquestioned, but he does so on his personal responsibility: *McEldery v. McKenzie*, 2 Port. 33, 27 Am. Dec. 643. And he must see to it that he is personally reimbursed out of the assets: *Sterrett v. Barker*, 119 Cal. 492. Hence a contract with one to render services in connection with and for the benefit of the estate may be made, but is binding only on the executor personally: *Estate of Page*, 57 Cal. 238; *McDaniel v. Parks*, 19 Ark. 671; *Matthews v. Matthews*, 56 Ala. 292; *Livermore v. Rand*, 26 N. H. 85; *Martin v. Platt*, 51 Hun. 429; *Baker v. Fuller*, 69 Me. 152; *Thomas v. Moore*, 52 Ohio St. 200; *Daingerfield v. Smith*, 83 Va. 81. Neither is the estate liable for money borrowed by an executor or administrator for the use of the estate: *Merchants' Nat. Bank v. Weeks*, 53 Vt. 115, 38 Am. Rep. 661; *Sterrett v. Barker*, 119 Cal. 492; *Glenn v. Burrows*, 37 Hun. 602. Nor does the executor bind the estate by giving a promissory note, though his power to make the note and bind himself personally is not doubted: *Germania Bank v. Michaud*, 62 Minn. 459, 54 Am. St. Rep. 653. See *Price v. McIver*, 25 Tex. 769, 78 Am. Dec. 558. We are not considering what an executor may do to bind the estate by contract if he acts under the direction of a court. We are concerned solely with the powers which he possesses at common law by virtue of his office.

There exist a few cases in which an executor may bind the estate by his contracts. At least in a few jurisdictions, an executor may bind the estate by a promise to pay an obligation of the decedent, but there must be a clear and just liability on the part of the estate: *Steele v. McDowell*, 9 Smedes & M. 193; *Rucker v. Wadlington*, 5 J. J. Marsh. 238; *Schmittler v. Simon*, 101 N. Y. 554, 54 Am. Rep. 737. Certainly, an executor can limit his personal liability to the amount of assets which come to his hands if he so stipulates in his agreement: *Allen v. Griffins*, 8 Watts, 397. *Brown v. Evans*, 15 Kan. 88, seems to intimate that an executor may bind the estate by any contract which he would have the authority to make, and for which he would be given credit in his account. The court said: "We do not think that the estate can be held liable for the promises of the administrator, unless the administrator has the right in law to make such promises, or to perform the thing which he promises. But we know of no good reason why an estate should not be held liable for promises made by the administrator where in law he has the right to make such promises, or where in law it is his duty, without a promise, to do just what he has promised to do." If this case attempts to establish the rule that an executor, by virtue of his office, may charge the es-

tate by any contract which he would have the right to make in the general discharge of his duties, and for which he would be given credit in his account, it is in direct conflict with the rule as it has been practically universally recognized. If an executor can bind the estate by a promise on his part, it is probably only in respect to "incidental charges in the due course of administration," as was said in *Farley v. Hord*, 45 Miss. 98. However, it is unnecessary to go into this question fully here, because whether he can bind the estate under any circumstances or not, there is no doubt that he has the power to enter into any necessary and reasonable contract in the course of administering the estate, and any expense to which he may be subject by reason of such contracts will be allowed him out of the assets of the estate when he comes to render his account: *In re Casey's Estate*, 6 N. Y. Supp. 608.

This distinction between the power of an executor to bind the estate by a contract and his power to make a contract for which he can receive credit in the settlement of his accounts has been frequently drawn and is firmly adhered to: See *Thomas v. Moore*, 52 Ohio St. 200. Hence an administrator may be given credit for the necessary expenses of administration: *Estate of Simmons*, 43 Cal. 543. This will include all expenses necessarily incurred by him in transacting the business of his trust: *Pearson v. Darrington*, 32 Ala. 227; *Nimmo v. Commonwealth*, 4 Hen. & M. 57, 4 Am. Dec. 488; *Glover v. Holley*, 2 Bradf. 291; *In re Wilson's Estate*, 2 Pa. St. 325; including an amount paid to appraisers: *In re Rose*, 80 Cal. 166; medical attendance to slaves who form a part of the estate: *Bomford v. Grimes*, 17 Ark. 567; and any sum properly spent under a contract for the purpose of preserving the estate: *Smith v. Davis*, 51 Ark. 415; including expenses incurred in taking care of the livestock: *Branham v. Commonwealth*, 7 J. J. Marsh. 190; and premiums paid for insurance effected by an executor or administrator on the personal assets: *Cornwell v. Deck*, 2 Redf. 87.

Employment of Agents.—The power of an executor to employ agents is more limited than their power to contract generally, for the reason that an executor or administrator is required to do a great share of the work himself connected with the settlement of an estate. This is particularly true of the ordinary services in connection with the collection and preservation of the estate. Executors are not permitted to employ agents, except under very special circumstances: *Weiss v. Dill*, 3 Mylne & K. 26. Hence he cannot be allowed for payments made to an attorney or bookkeeper for services which he should have performed himself, nor for services made necessary in consequence of neglect of duty or unnecessary and unreasonable delay in closing the administration: *In re Moore*, 72 Cal. 335. Executors must not only assume the responsibilities of their office and exercise a proper discretion, but, within rea-

reasonable limits, they must perform the actual manual labor requisite to the due execution of their trust. In *Matter of Harbeck*, 81 Hun, 26, it was said that "the fact that they [the executors] are busy men and have not much time to give to the management of estates as other individuals, cannot be permitted to affect the legal rule, which must be applied and enforced whenever a question is presented touching the propriety or legality of the expenditure of the moneys of an estate." Ordinary clerical assistance cannot be employed, or, if it is, an executor cannot be reimbursed out of the estate for it: *Miles v. Peabody*, 64 Ga. 729; *Fowler v. Lockwood*, 8 Redf. 465. Neither can he employ an agent to collect money for the estate under his care, no resort being had to legal process, and the agent being neither a public officer nor an attorney: *Gwynn v. Dorsey*, 4 Gill & J. 453.

While an executor cannot employ another to perform services in the ordinary course of administration which it is his duty to perform, there are special circumstances under which he may employ agents to render services in connection with the proper settlement of the estate. He may employ an agent to do those services which an executor cannot be supposed competent to render, and for these expenses he will be reimbursed: *Teague v. Dendy*, 2 McCord Eq. 207, 16 Am. Dec. 643. If the situation or nature of the property requires that some one be employed, he is authorized to procure such assistance: *Vanderheyden v. Vanderheyden*, 2 Paige, 287, 21 Am. Dec. 86. He may employ another to do any special or extraordinary service which does not come within the ordinary scope of his personal duties: *Yarborough v. Ward*, 34 Ark. 204; *Glover v. Holley*, 2 Bradf. 291; and which in their nature require a degree of skill not within the command of ordinary persons: *Henderson v. Simmons*, 33 Ala. 291, 70 Am. Dec. 590. It has been held proper for an executor to employ an overseer: *Lee v. Lee*, 6 Gill & J. 316; laborers to work on a farm: *Byrd v. Wells*, 40 Miss. 711; real estate agents to sell lands, where the executor had power over such lands: *Armstrong v. O'Brien*, 83 Tex. 635; and an auctioneer to sell personal property: *Shepard v. Shepard*, 19 Fla. 300; *Pinckard v. Pinckard*, 24 Ala. 250.

An attorney at law is one class of agents which it is always proper for an executor to employ, whenever it is necessary in connection with the settlement of the estate. So extensive and complete is the executor's power in this respect that he is not required to employ the attorney named in the will and selected by the testator as the one to employ and consult on all matters pertaining to the estate. He may wholly disregard such direction in the will and employ whom he pleases: *In re Ogier*, 101 Cal. 381, 40 Am. St. Rep. 61; *Young v. Alexander*, 16 Lea, 108. As in other contracts made by an executor, he cannot bind the estate by any contract to employ an attorney: *Pike v. Thomas*, 62 Ark. 223, 54 Am. St. Rep. 292; *Gurnee v. Maloney*, 38 Cal. 85, 99 Am. Dec. 352; *Mygatt v.*

Willcox, 45 N. Y. 306, 6 Am. Rep. 90; Tucker v. Grace, 61 Ark. 410; Austin v. Munro, 47 N. Y. 360; Wait v. Holt, 58 N. H. 467. And while he cannot bind the estate by such a contract, if the employment of the attorney was necessary and proper to protect the estate or to enable him properly to manage it, he will be allowed a reasonable amount for such services out of the estate in the settlement of his account: Kingsland v. Scudder, 86 N. J. Eq. 284; Estate of Miner, 46 Cal. 564; Morgan v. Nelson, 43 Ala. 586; Matter of Nicholson, 1 Nev. 518; Matter of Bailey, 47 Hun, 477; Young v. Kennedy, 95 N. C. 265; Merkel's Estate, 131 Pa. St. 584.

The Payment of Legacies is one of the last duties of an executor, and with respect to it he has ample power. The title to all the personal property being in the executor or administrator, a legatee or distributee has no right to his share of the personal estate until the executor or administrator assents thereto: Sneed v. Hooper, Cooke, 200, 5 Am. Dec. 691; Refeld v. Bellette, 14 Ark. 148; Suggs v. Sapp, 20 Ga. 100; Hudson v. Reeve, 1 Barb. 89; Smith v. Townes, 4 Mulf. 191. The executor has full power to assent to legacies whenever he sees fit. He may even do so before the probate of the will: Gordon v. Woods, 4 Bibb, 476; Aleck v. Tevis, 4 Dana, 242; or before the debts of the estate have been paid: Edney v. Bryson, 2 Jones, 365; Thompson v. Schmidt, 3 Hill (S. C.), 156. And while he has power to assent to and pay legacies prior to the payment of debts, by so doing he will render himself liable to creditors for the payment of their debts if the assets of the estate prove insufficient. His first duty is toward the creditors; indeed, the payment of debts was at one time his chief function. This duty he should perform before legacies are paid, and a failure to do so renders him personally liable for the debts which remain unpaid: McIntosh v. Hambleton, 35 Ga. 94, 89 Am. Dec. 276; Thrash v. Sumwalt, 5 Ala. 13; Johnson v. Fuguay, 1 Dana, 514; North v. Priest, 81 Mo. 561; McKinder v. Littlejohn, 1 Ired. 66; Thomas v. Riegel, 5 Rawle, 266. The premature assent of an executor to a legacy is at his own risk, and renders him liable to creditors as for a devastavit: Handly v. Heflin, 84 Ala. 600.

In England, if an executor paid legacies before the debts of the estate were satisfied, it was an admission on his part that he had sufficient assets with which to pay debts, and if subsequently the assets failed to prove sufficient, he could nevertheless not recover from the legatee any part of the share paid him: Orr v. Kaines, 2 Ves. 194; Davis v. Newman, 2 Rob. (Va.) 664, 40 Am. Dec. 764. But if the executor had no notice of a debt and was subsequently required to pay it, he might recover from the legatee his proportion of the amount of the debt: Whittaker v. Kershaw, L. R. 45 Ch. D. 820. This seems to have been the only case in which an executor could recover from a legatee the amount which he had voluntarily paid him: McEndree v. Morgan, 31 W. Va. 521. To some extent this rule has been adopted in some jurisdictions in this country.

but its severity has been relaxed to some extent. Thus, if the assets prove insufficient to pay the debts and the executor is compelled by creditors to satisfy them, it is probable that in this country he would be subrogated to the rights of the creditors as against the legatees, and might compel such legatees to refund. But in such case the executor must be free from misconduct: *Davis v. Newman*, 2 Rob. (Va.) 664, 40 Am. Dec. 764. To what extent the rule has been relaxed is well stated by the headnote in *McEndree v. Morgan*, 31 W. Va. 521: "The rule which refuses an executor the right to recover back from a legatee an excess of advancement beyond his ratable proportion, which he may have paid him, is not inflexible, even when the deficiency in the assets was not created by the subsequent appearance of debts. But after such voluntary payment under such circumstances the executor will have to make out a very strong case to rebut the almost conclusive presumption that he had a sufficiency of assets to justify the payment of the legacy, which arises from the mere fact that he has paid it without taking a refunding bond. It will not be sufficient in such case, in order to rebut such presumption, for the executor to show that he acted bona fide and with honest intentions; but he must show, further, that he acted in paying the legacy with prudence and caution under existing circumstances." It seems that at least in two jurisdictions the English common-law rule prevails that where there are no debts, and the estate turns out to be inadequate to pay legacies, the executor cannot compel those legatees who have been paid in full to refund any portion of their share: *Davis v. Newman*, 2 Rob. (Va.) 664, 40 Am. Dec. 764; *Anderson v. Piercy*, 20 W. Va. 282.

But it may be said that generally, in this country, the rule prevails that where an executor has paid a legacy under some mistake of fact, it may be recovered by him: *Wolf v. Bealrd*, 123 Ill. 585, 5 Am. St. Rep. 565; *Stokes v. Goodykoontz*, 126 Ind. 535; *Rogers v. Weaver*, 5 Ohio, 536. See, also, *Northrop v. Graves*, 19 Conn. 548, 50 Am. Dec. 264. Where the distribution is made before debts have been paid, without a full knowledge of the condition of the estate, and with the consent and full knowledge of the distributees, and for their accommodation, the executor can recover any excess needed for the subsequent payment of debts: *Alexander v. Fisher*, 18 Ala. 374. In order to recover, however, an executor must show himself to be free from neglect: *Donnell v. Cooke*, 63 N. C. 227. And if the deficiency of assets has been occasioned by the waste of the executor, the legatee is not required to refund for the benefit of a colegatee, but it seems that he will still be obliged to as against a creditor: *Lupton v. Lupton*, 2 Johns. Ch. 614.

If a legatee is also a debtor of the estate, the executor may retain the amount of the debt out of the legacy: *Nelson v. Murfee*, 69 Ala. 508; *Close v. Van Husen*, 19 Barb. 505; *Blackler v. Boott*,

114 Mass. 24; Earnest v. Earnest, 5 Rawle, 213; Webb v. Fuller, 85 Me. 443. But he cannot retain out of a legacy the amount of an indebtedness due to him personally: McLaughlin v. Barnes, 12 Wash. 373; Kidd v. Porter, 13 Ala. 91; Bondurant v. Thompson, 15 Ala. 202. See, however, Hooper v. Hooper, 82 W. Va. 526, at page 548.

PHINIZY v. GUERNSEY.

[111 Georgia, 346.]

VENDOR AND PURCHASER—LOSS BY FIRE.—When a binding agreement is entered into to sell land, and the improvements thereon were destroyed by fire before the vendor was in a condition to convey and before the vendee had gone into possession, the loss falls upon the vendor and not on the purchaser.

INSURANCE MONEY—WHO ENTITLED TO—VENDOR AND PURCHASER.—Where, as between a vendor and vendee of real estate, the improvements on which are destroyed by fire, the loss falls upon the vendor, he is entitled to collect and hold the money due on insurance policies issued on the property.

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE BY VENDOR.—Where property which is the subject of a contract of sale has been substantially damaged or materially changed between the date of the contract and the time when the vendor offers to convey, the courts will not decree a specific performance of the contract at the instance of the vendor.

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE BY VENDEE.—When there has been a binding agreement to sell improved real estate, and before the property is conveyed the improvements thereon are destroyed by fire without the vendor's fault, a court of equity will, at the instance of the vendee, compel a specific performance of the contract, and will allow an abatement of the purchase price in such an amount as is just and reasonable in view of the changed condition of the property.

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—ABATEMENT IN PRICE—HOW DETERMINED.—In a suit by a vendee for specific performance, where the improvements on the property have been destroyed by fire, the amount which the vendee should pay is determined by first ascertaining the market value at the date of the contract of the property both with and without improvements. If the value of the improved lot is greater than the contract price, the difference between these two sums represents the vendee's profit, which amount deducted from the value of the lot unimproved will be the amount the vendee is required to pay. If the value of the improved lot is less than the contract price, the difference represents the vendee's loss, which amount added to the value of the lot unimproved is the amount the vendee is required to pay.

Joseph R. Lamar, for the plaintiff.

Joseph B. & Bryan Cumming, for the defendants.

347 COBB, J. This was an action brought for the purpose of compelling the specific performance of a contract for the sale of land. According to the allegations of the petition, the defendants, who were the owners of a city lot upon which was situated a building, entered into a written agreement to sell the same to the plaintiff for the sum of sixteen thousand dollars, of which five dollars was paid when the writing was signed and the balance was to be paid when the vendee should satisfy himself that the vendors' title to the property was good. The plaintiff had agreed to take the property, but, though it is not affirmatively stated in the petition, it is clearly inferable therefrom that he never entered into possession. The written agreement to sell the property was signed on January 28, 1899. A conveyance of the property was delayed while the plaintiff was investigating the title, and after this investigation a further delay was occasioned by the fact that the defendants could not have canceled a security deed which they had given to the property, for the reason that the holder thereof refused to cancel the same until his bond for titles was surrendered, and that paper had been lost by the defendants. Pending this delay, on June 8, 1899, the building on the bargained premises was destroyed by fire through no fault of the defendants. There were at the date of the fire in full force policies of fire insurance for amounts aggregating the sum of ten thousand dollars. The plaintiff avers his desire to comply with the contract of sale, so far as it is possible in the changed condition of affairs to carry the same into effect. He alleges that he is willing to take the land and that the amount to be paid by him should be ascertained by the application of equitable principles. There was no agreement between the parties with reference to the ownership of the policies of insurance 348 prior to the actual conveyance of the property, though it was agreed that when the property was conveyed in accordance with the terms of the contract the policies of insurance should be assigned to the plaintiff. The prayers of the petition were, that the defendants be decreed to make to plaintiff a conveyance of the land under the terms set forth in the contract of sale, the court to make an abatement in the purchase price to the extent of the value of the improvements destroyed by fire, and for general relief. By amendment prayers were added that, in the event the court should be of the opinion that the plaintiff is not entitled to an abatement of the purchase money by reason of the destruction of the improvements, a decree should be en-

tered that upon payment of the purchase money the defendants should be required to make to the plaintiff a deed to the land and turn over to him the insurance money collected. There was a demurrer to the petition, on the ground that the facts set forth did not entitle the plaintiff to the relief prayed, and that, on account of the changed condition-in affairs, a specific performance of the contract was impracticable. The court sustained the demurrer and dismissed the petition, and to this ruling the plaintiff excepted.

1. "When a binding agreement is entered into to sell land, equity regards the vendor as a trustee of the legal title for the benefit of the vendee, while the latter is looked upon as a trustee of the purchase money for the benefit of the former": Bispham's Equity, 5th ed., sec. 364. This rule, however, is not applicable unless there is an ability as well as a willingness on the part of the vendor to convey, the purchaser not being considered as the owner from the date of the contract unless the vendor is prepared to convey a clear title and is not in default: 1 Warvelle on Vendors, 195. In the case of Mackey v. Bowles, 98 Ga. 730, it was held that if, after the parties had entered into a binding executory contract to sell, the property was damaged before the vendor was in a condition to convey, the loss fell upon the vendor and not on the purchaser. The loss in that case arose out of the destruction by fire of the building situated upon the land which was the subject matter of the sale: See, also, in this connection, Kinney v. Hickox, 24 Neb. 167; Thompson v. Gould, 20 Pick. 134. Applying the principles above ³⁴⁹ stated to the present case, as the vendee had not gone into possession before the fire, and the vendors were not, prior to that occurrence, in a position where they could make to the vendee an unencumbered title to the property, they were the owners of the property at the date the fire occurred, and the loss resulting therefrom must fall upon them. If the contract has been so far completed that the vendee is to be treated as the owner of the premises, then the loss falls upon him, as was the case in Paine v. Meller, 6 Ves. Jr. 349, where it was held that when there was a contract for the sale of houses, which on account of defects in the title could not be completed, the treaty, however, proceeding upon a proposal to waive the objections upon certain terms, and the houses were burned before the conveyance, the purchaser was bound if he accepted the title; and the fact that the vendor allowed insurance on the houses to expire on the day on which the con-

tract was originally to have been completed, without notice to the vendee, made no difference.

2. The next question to be determined is, Who was entitled to collect the insurance? As has been seen, the loss occasioned by the fire fell upon the vendors, and it would seem that the indemnity against loss should belong to them. This is, we believe, the rule in such cases. If the contract of sale had been so far completed that the vendors would have held the legal title as trustees for the vendee, then they would likewise have held title to the policies in the same capacity. But as they were the owners of the property to the extent that the loss occasioned by the fire fell upon them, they will also be treated as owners of the property so far as the right to the insurance on the building is concerned. In *Poole v. Adams*, 33 L. J., N. S., 639, it was held that a purchaser of property insured, which was destroyed by fire, does not, by the mere fact of purchase, acquire a right to the insurance money. It has been held in some cases that where a contract of sale is so far completed that the vendor is to be treated as the trustee of the vendee, the vendor would also hold in trust for the vendee a policy of insurance which was on the property at the time the contract was made; and that if a loss by fire occurred between the date of the contract and the time fixed for the delivery of the deed, the vendor would be compelled to account to the vendee for the insurance ³⁵⁰ money collected on the policy, as he was in equity the owner of the property at the time of the fire and the loss fell upon him: *Reed v. Lukens*, 44 Pa. St. 200, 84 Am. Dec. 425. See, also, *Insurance Co. v. Updegraff*, 21 Pa. St. 513; *Williams v. Lilley*, 67 Conn. 50; *Grange Mill Co. v. Western Assur. Co.*, 118 Ill. 396. The rule is thus stated by the supreme court of Ohio in *Gilbert v. Port*, 28 Ohio St. 276 (8): "As between vendor and vendee, under a valid and subsisting contract of sale of real estate, covered by a policy of insurance, where a loss insured against occurs after the date of the contract and before conveyance, the true test for determining to whom the money recovered on the policy belongs, in the absence of stipulations governing, is to determine who was the owner and which party actually sustained the loss." As in the present case the loss fell upon the vendors, they were entitled to collect and hold the money due by the insurance companies on the policies issued on the property.

3. When there has been a binding agreement to sell improved real estate, and before the property is conveyed the improve-

ments upon the property are destroyed by fire without the fault of the vendor, will a court of equity compel at the instance of the vendee a specific performance of the contract? Section 4041 of the Civil Code declares: "The vendor seeking specific performance must show an ability to comply substantially with his contract in every part, and as to all the property; but a want of title, or other inability as to part, will not be a good answer to the vendee seeking performance, who is willing to accept title to the part, receiving compensation for the other. If the defects in the vendor's title be trifling, or comparatively small, equity will decree at his instance granting compensation for such defects." The section quoted is but a codification of the general rules recognized by courts of equity in reference to applications for the specific performance of contracts. "It is settled that immaterial deficiencies will not deprive the vendor of his right to have the contract performed as against the vendee, provided that the deficiencies are such as may be compensated in money. Under such circumstances the vendee may be compelled to take the property, and a suitable deduction will be made in the price. But if the deficiencies are material and ³⁵¹ important, the vendee will not be compelled to take the property. He is entitled to have what he bargained for; and it would, obviously, be extremely unjust to force anything upon him which he had not designed or contracted to buy. If there is a failure in that which is an inducement to the purchase, he will not be compelled to take": Bispham's Equity, sec. 389. In *Gould v. Murch*, 70 Me. 288, 35 Am. Rep. 325, it was held: When the owner of land with a building thereon agrees to convey it at a future day on payment of the purchase money, and before payment and conveyance the building is destroyed by fire without the fault of either party, the loss must fall upon the vendor; and if the building formed a material part of the value of the premises, the vendee cannot be compelled to take a deed to the land alone and pay the purchase money: See, also, *Smith v. Cansler*, 83 Ky. 367; *Wells v. Calnan*, 107 Mass. 514, 9 Am. Rep. 65; *Powell v. Dayton etc. R. R. Co.*, 12 Or. 488; *Kinney v. Hickox*, 24 Neb. 167; *Huguenin v. Courtenay*, 21 S. C. 403, 53 Am. Rep. 688. It may be stated as a general rule that where property which is the subject of a contract of sale has been substantially damaged or materially changed between the date of the contract of sale and the time when the vendor offers to convey, the courts will not decree a specific performance of the contract at the instance of the vendor. The

reason for this is apparent. The vendor has no right to force upon the vendee something which he has not agreed to buy.

The rule is different, however, when the application for specific performance comes from the vendee. There is a manifest reason for this difference. The vendee has a right, if he sees proper to do so, to accept less than he bargained for, and compensation for the loss of that which he does not obtain. If for any reason the vendor cannot convey to the vendee substantially what the contract calls for, of course a specific performance of the contract according to its terms is impossible. Such obstacles to a specific performance may arise from a defect in the title to some portion of the premises bargained for, or from the fact that the interest of the vendor is different from that described in the contract, or the property may be subject to liens or encumbrances, or, if the subject of the contract is land, it may be deficient in quantity or quality or value. "In such a ³⁵² case, there are only three possible alternatives for a court of equity to pursue—either to refuse its remedy entirely; or to enforce the contract without any regard to the partial failure, compelling the purchaser to take what there is to give and to pay the full price as agreed; or to decree a conveyance of the vendor's actual interest, and allow to the vendee a pecuniary compensation or abatement from the price, proportioned to the amount and value of the defect in title or deficiency in the subject matter": Pomeroy on Specific Performance of Contracts, sec. 434. In the same connection the author just quoted says that the first alternative might often contravene the wishes and interests of both parties, and cannot, therefore, be taken as the universal rule; that the second one would be extremely unjust and inequitable, though it is occasionally resorted to when the vendee is not in a situation which entitles him to favorable consideration; that the third is based upon equitable principles, it endeavors to preserve the rights of both parties, and is therefore constantly resorted to and applied by courts of equity in aid of a vendee and sometimes, although under more and greater restrictions, in aid of the vendor; but that there are circumstances under which even a vendee is not allowed to avail himself of the doctrine. In section 435 the same author says: "If the purchaser is willing and desirous to take the partial interest which the vendor can convey, and especially if he is the party calling upon the court for relief, there can be but little difficulty in granting him the remedy of performance, with a reasonable compensation

for the defects." Mr. Bispham, in his work on the Principles of Equity, thus states the rule: "It may sometimes happen that defects exist which render the property less valuable than the contract price; but which, nevertheless, may not be of so vital a character as to induce the purchaser entirely to throw up his bargain. In such a case the equity of specific performance with compensation comes into play for the benefit of the vendee. He is entitled to have the agreement carried out, and yet at the same time to have an abatement or allowance made by reason of the defects": Bispham's Equity, sec. 390. See, also, Fry on Specific Performance of Contracts, 3d ed., secs. 1222, 1223; 2 Story's Equity Jurisprudence, 13th ed., sec. 779; 2 Sutherland on Damages, 2d ed., sec. 589, p. 1311; 2 Beach's Modern Equity Jurisprudence, secs. 624, 627; 22 Am. & Eng. Ency. of Law, 1st ed., 942, 943; Harbers v. Gadsden, 6 Rich. Eq. 284, 62 Am. Dec. 390.

The text-books and cases cited show that the doctrine of specific performance with compensation for defects, when the vendor cannot convey exactly what his contract calls for, is thoroughly established, and it is in rare cases where the court will refuse such relief at the instance of the vendee. It is true that in nearly, if not all, of the cases the inability on the part of the vendor to convey what the contract called for arose from some fact which was in existence at the time the contract of sale was made, such as defects in the title to a part of the premises, deficiency in quantity or quality or value of the property which was the subject matter of the contract, and the like. There does not seem, however, to be any good reason why the principle should not be applicable where the inability of the vendor to convey a part of that which his contract stipulated for arose, subsequently to the making of the contract, out of some transaction in which the vendee was not involved; and the fact that the vendor was himself without fault would not seem to be an obstacle which would prevent the application of the rule. Requiring a vendor to pay damages to his vendee for a failure to convey property which, subsequently to the execution of the contract of sale, was destroyed by fire, is no greater hardship than requiring a vendor to pay damages on account of his having ignorantly, though honestly, and after the exercise of all possible diligence, bargained away something which he did not own but which he believed was his own. That he would be required to pay damages in the latter case no one will doubt; that he should be in the former case ought

not, it would seem, to be questioned upon principle. In *Lombard v. Chicago Sinai Congregation*, 64 Ill. 477, which was a case of an executory contract for the sale of real estate, where the vendor was to furnish an abstract of title, and, if not satisfactory, he was to have the option of perfecting the title, or annulling the contract and returning the money paid, and the abstract failed to show title, and the vendor failed to exercise his option, after notice to do so, until after buildings thereon were destroyed by fire, the vendor still remaining in possession, it was held, on a bill by the vendee for the specific performance of the contract as to the ³⁵⁴ land and compensation for the buildings and property destroyed, that the contract was not so complete as to make the land the property of the vendee, so as to throw upon him the loss of the buildings, and that, upon specific performance being ordered, the vendee was entitled to compensation for the loss, to be deducted from the purchase money; and that the vendor was entitled to interest on the unpaid purchase money only from the time a good title to the property was shown, the vendor being entitled to the rents and profits up to such time. The case just referred to is the only one which has been called to our attention which is at all similar to the present case. Upon principle, however, we have no hesitancy in holding that the vendee in a case like the present is entitled to have a conveyance made to him of the land and compensation for the loss of the building, provided the loss thus sustained is capable of computation. If the plaintiff sustains his allegations, a decree should be entered that the defendants convey to him the land which was the subject matter of the contract, and that the purchase price be abated in such an amount as is just and reasonable in view of the changed condition of the property.

4. If the difference in value between the interest contracted for and the interest that can be conveyed is incapable of computation, of course the court will not undertake to enter a decree for specific performance with compensation for defects. But, as has been said, in the light of many adjudicated cases, "it is conceived that the court will seldom now consider a difficulty of this kind insuperable": *Fry on Specific Performance of Contracts*, sec. 1240. We do not think the present case falls within the rule above referred to, as it seems to us that the amount which should be allowed to the plaintiff as compensation for the loss sustained by him in not obtaining a conveyance of the land with the building on it can be made the subject of exact com-

putation. Let it be kept in mind that the plaintiff is entitled to be placed, so far as property and money will place him, in exactly the same position that he was in on the day that the contract of sale was entered into. If on that day the property was worth more than he agreed to pay for it, he is entitled to the profit on his bargain. If, on the other hand, the property was worth less than he agreed to pay for it, he must suffer the loss. Let ³⁵⁵ it be ascertained what was the market value of the property with the building on it on the day that the contract was entered into. Let it also be ascertained what was the market value of the lot, without regard to the building, on that day. If the market value of the improved lot was more than the contract price, the difference between these two sums would be the profit that the plaintiff would have realized on his bargain. Deduct the amount of profit from the market value of the lot alone, and the sum remaining will be the amount which the plaintiff should be required to pay. If the market value of the property and the contract price are the same, then the plaintiff should be required to pay a sum which would equal the market value of the lot without the building. If the market value of the whole property was less than the contract price, then the plaintiff should be required to pay the market value of the lot without the building, and in addition to this the difference between the market value of the lot and building and the contract price, provided that in no event should the plaintiff be required to pay more than sixteen thousand dollars. While we find no rule for computing the amount of compensation in such cases, we think the above rules are in accordance with equitable principles and are deducible from the general rules which seem to have been recognized by the courts and text-writers: See, in this connection, *Smith v. Kirkpatrick*, 79 Ga. 410; 2 *Sutherland on Damages*, 2d ed., 1311, 1312; 2 *Beach's Modern Equity Jurisprudence*, sec. 629; *Wilcoxon v. Calloway*, 67 N. C. 463; *Fry on Specific Performance of Contracts*, sec. 1239. The prayers of the petition were broad enough to authorize relief along the lines above indicated. The court erred in sustaining the demurrer, and the case should be tried in the light of what is here laid down.

Judgment reversed.

All the justices concurring.

INSURANCE, FIRE.—IF A VENDOR has entered into an agreement for the sale of insured property, but has not made a conveyance nor received the purchase money, his interest in the property

and in the policy of insurance is not thereby parted with so as to bar his right of action on the happening of a loss: See the monographic note to *Reed v. Lukens*, 84 Am. Dec. 429.

SPECIFIC PERFORMANCE.—A VENDEE IS ENTITLED to specific performance with an abatement in price, if the vendor, in the agreement, misdescribes the land as to quality: *Harbers v. Gadsden*, 6 Rich. Eq. 284, 62 Am. Dec. 390; or as to quantity: *Walling v. Kinnard*, 10 Tex. 508, 60 Am. Dec. 216.

SPECIFIC PERFORMANCE.—A VENDOR IS NOT ENTITLED to specific performance if, before the time for conveyance, the subject matter of the contract of sale is in part destroyed: *Huguenin v. Courtenay*, 21 S. C. 403, 53 Am. Rep. 688.

SOUTHERN FIRE INSURANCE COMPANY v. KNIGHT.

[111 Georgia, 622.]

INSURANCE—PROOFS OF LOSS—FORFEITURE OF POLICY.—Under an insurance policy which provides that proofs of loss shall be furnished within sixty days, but the furnishing of the proofs within such time is not made a condition precedent to recovery, the failure so to do will operate simply to postpone the right of the insured to bring a suit until after he has furnished the proofs of loss required by the policy.

INSURANCE—PROOFS OF LOSS—TIME OF FURNISHING.—Where an insurance policy stipulates that the loss shall not become payable until sixty days after the proofs of loss have been furnished, and requires also that any suit on the policy must be commenced within twelve months after the fire, the insured must submit his proofs of loss in time for sixty days to elapse between the time when they were furnished and the expiration of the twelve months' limitation.

INSURANCE—IRON-SAFE CLAUSE.—INVOICES OF GOODS PURCHASED, covering every article embraced within a stock of merchandise on a given day, is not an inventory of such stock within the meaning of an "iron-safe clause," which requires the insured to take a complete itemized inventory of stock on hand at least once in each calendar year.

INSURANCE—DIFFERENT CLASSES OF PROPERTY—ENTIRE CONTRACT—FORFEITURE.—Where an insurance policy is issued in consideration of a gross premium, and provides that the policy shall be void in the event of a breach of a certain condition named therein, and this condition is broken, no recovery can be had on the policy, though separate classes of property are insured, and the stipulation violated relates solely to a matter connected with but one of these classes.

W. I. Heyward, for the plaintiff in error.

James K. Hines, contra.

623 COBB, J. M. A. and L. L. Knight brought suit against the Southern Fire Insurance Company upon a policy of fire

insurance. The case came on for trial, and at the conclusion of the testimony for the plaintiffs the defendant made a motion for a nonsuit, which the court overruled. The case proceeded to trial, and resulted in a verdict for the plaintiffs. The defendant brings the case here upon a bill of exceptions assigning error upon the refusal of the court to grant a nonsuit.

1. The policy which was the foundation of the action contained a clause which provided that, "if fire occur, the insured shall give immediate notice of any loss thereby, in writing, to this company, . . . and within sixty days after the fire, unless such time is extended in writing by this company, shall" furnish proofs of loss of a designated character. While it appears from the evidence that proofs of loss had been submitted to the company before suit was brought, they were not submitted until after the expiration of sixty days from the date of the fire, and the time for their submission was not extended by the company. The defendant contends that the failure on the part of the insured to furnish the proofs of loss within the time specified in the policy precludes a recovery thereon. It has been often held, and may now be considered as settled law, that if there is an express stipulation in a policy of fire insurance that the furnishing of proofs of loss within a specified time shall be a condition precedent to a recovery, or that a failure to submit the proofs within the time limited in the policy shall forfeit the same, such failure on the part of the insured will be fatal to his right to recover: See 13 Am. & Eng. Ency. of Law, 2d ed., 328, notes 7, 8. There is not in the policy involved in the present investigation either a stipulation that the furnishing of proofs of loss within sixty days shall be a condition precedent to a recovery, or that the failure so to do shall operate as a forfeiture of the policy. While the decisions of the American courts are not entirely uniform on this question, the current of authority seems to be that in the absence of a stipulation providing that the furnishing of the proofs within a designated time shall be a condition precedent to recovery, or that the failure to submit the proofs within such time shall work a forfeiture of the policy, the failure so to do will operate simply to postpone the right of the insured to bring a suit until after he has furnished the proofs of loss required by the policy. This results from the familiar rule that forfeitures are not favored, and that a contract will not be construed to work a forfeiture unless it is manifest that it was the intention of the parties that it should have that ef-

fect. Especially would this be applicable in the case of a contract of insurance which contains many conditions a failure to perform which are expressly stated to operate as a forfeiture of the contract, and which is silent as to the effect to be given to a failure to perform the condition relating to the furnishing of proofs of loss within a specified time. The policy is prepared by the insurer, and, therefore, must be construed most strongly against him.

Mr. Joyce in his work on Insurance, volume 4, section 3282, thus states the rule with reference to the failure to furnish the required proofs within the time designated: "If a policy of insurance provides that notice and proofs of loss are to be furnished within a certain time after loss has occurred, but does not impose a forfeiture for failure to furnish them within the time prescribed, and does impose forfeiture for a failure to comply with other provisions of the contract, the insured may, it is held, maintain an action, though he does not furnish proofs within the time designated, provided he does furnish them at some time prior to commencing the action upon the policy. And ⁶²⁵ this has been held to be true even though the policy provides that no action can be maintained until after a full compliance with all the requirements thereof." The above quotation and the decision made in the present case will be found to be supported by the following cases: *Steele v. German Ins. Co.*, 93 Mich. 81; *Hall v. Concordia Ins. Co.*, 90 Mich. 403; *Tubbs v. Dwelling-House Ins. Co.*, 84 Mich. 646; *Rynalski v. Insurance Co. of Pa.*, 96 Mich. 395; *German Ins. Co. v. Brown* (Ky., Jan. 30, 1895), 29 S. W. Rep. 313; *Vangindertaelen v. Phenix Ins. Co.*, 82 Wis. 112, 33 Am. St. Rep. 29; *Flatley v. Phenix Ins. Co.*, 95 Wis. 618; *Kahnweiler v. Phoenix Ins. Co.*, 57 Fed. Rep. 562; *Kenton Ins. Co. v. Downs*, 90 Ky. 236; *Coventry etc. Ins. Co. v. Evans*, 102 Pa. St. 281; *Taber v. Royal Ins. Co.* (Ala., June 5, 1899), 26 So. Rep. 252; *Rheims v. Standard Ins. Co.*, 39 W. Va. 672; *Shell v. German Ins. Co.*, 60 Mo. App. 644; *Sun Mut. Ins. Co. v. Mattingly*, 77 Tex. 162.

It not being indispensable to a recovery on the policy that the proofs of loss should be submitted within sixty days, the question arises as to what lapse of time will preclude the plaintiffs from furnishing proofs of loss and asserting a liability under the policy. The answer to this is, that if the plaintiffs failed within a reasonable time after loss to furnish the proofs of loss, their right to make the proof would be gone and their

right to recover on the policy would consequently be at an end. What would be a reasonable time is to be determined by the peculiar facts of each case; and in determining this question a valid stipulation in the policy, that no suit should be brought thereon after the lapse of a given time, should be taken into consideration. The policy sued on in this case provides that "no suit or action on this policy for a recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements nor unless commenced within twelve months after the fire." A stipulation of this character has been held by this court to be valid: *Brooks v. Georgia Home Ins. Co.*, 99 Ga. 116, and cases cited; *Graham v. Niagara Fire Ins. Co.*, 106 Ga. 840. The policy contains a further stipulation that "the loss shall not become payable until sixty days after the" proofs of loss have been ⁶²⁶ furnished. As each of these stipulations is valid, the insured must, in any event, have submitted their proofs of loss in such a time that at least sixty days would elapse between the date of the submission of such proofs and the time that suit should be brought under the stipulation that suits to enforce the policy must be brought within twelve months from the date of the fire. In this connection see *Steele v. German Ins. Co.*, 93 Mich. 81; *Kenton Ins. Co. v. Downs*, 90 Ky. 236; *Coventry etc. Ins. Co. v. Evans*, 102 Pa. St. 281; *Rheims v. Standard Ins. Co.*, 39 W. Va. 672. The proofs in the present case having been submitted more than sixty days before the expiration of twelve months from the date the fire occurred, the court properly refused to grant the nonsuit on account of a failure to submit the proofs within the time fixed in the policy, as it was a question for the jury whether a reasonable time for furnishing the proofs had elapsed between the date the fire occurred and the date that the proofs of loss were submitted. This ruling is not in conflict with any former decision of this court. A number of decisions of this court can be found where the court dealt with the case as if the failure to submit proofs of loss within the time specified in the policy would preclude a recovery thereon, and there are, in the language used in some of the opinions, expressions which would indicate that the judges writing the same entertained the view that such a failure would bar a right of recovery; but a careful examination has failed to disclose any case decided by this court where this question was squarely presented for decision and necessary to be decided. Some of these decisions which

are apparently in conflict with the ruling now made will be referred to, as well as others which are apparently in line with the present ruling, although, as has been said, none contain authoritative rulings on the question.

In *Aetna Ins. Co. v. Sparks*, 62 Ga. 187, it was held that an amendment to the petition sufficiently alleged, as against a general demurrer, that an absolute refusal to pay was within the time limited for preliminary proof of loss, it being stated that no subsequent refusal would operate as a waiver of such proof. In speaking of the amendment, Mr. Justice Jackson says: "Besides, the effect and true intent thereof seems to be that the refusal was within the time, inasmuch as the allegation is that ⁶²⁷ thereby the proofs were waived—these proofs having to be made in this time." It having been held that the allegation was that the refusal was within the sixty days, it was not necessary in that case to determine what would have been the effect of a refusal after sixty days, and therefore what was said on that subject is clearly obiter. In addition to this, an examination of the record in that case discloses that there was no time specified in the policy in which preliminary proofs must be submitted. The only reference in the policy to the phrase "sixty days" is that the policy shall not be payable until sixty days after notice and proof of loss; and the policy in terms provided that the proof of loss should be furnished "as soon as possible" after the fire. While in *Merchants' Ins. Co. v. Vining*, 67 Ga. 661, the question now under consideration was not at all involved, some language of Mr. Chief Justice Jackson rather indicates that the ruling now made is correct. In referring to the two policies then under consideration, he says, in substance, that even if nothing equivalent to an absolute waiver had occurred, there was nothing in the policies which required their forfeiture on account of failure to furnish preliminary proofs of loss. In *Southern Home etc. Assn. v. Home Ins. Co.*, 94 Ga. 167, 47 Am. St. Rep. 147, Mr. Justice Simmons, in referring to a stipulation in reference to preliminary proofs of loss, says: "It was a condition precedent to the payment of the loss that the proof of loss stipulated for should be made out and submitted to the insurance company and within the time stipulated." The question as to whether the time stipulated in the policy was of the essence of the contract was not at all involved in that case; the sole question being whether a stipulation in a policy of fire insurance which declares, in substance, that no act or neglect on the part of the

mortgagor would defeat the insurance so far as the interest of the mortgagee was concerned, would dispense with the making of proofs of loss. In that case it did not appear that any proofs of loss were submitted by either the mortgagor or the mortgagee, and it was simply held that the proofs of loss must have been submitted by either one or the other.

In *Liverpool etc. Ins. Co. v. Ellington*, 94 Ga. 785, 788, Mr. Justice Simmons says: "One of the conditions of the policy declared upon was, that if the property should be destroyed by fire, the insured should furnish the insurance company with ⁶²⁸ proofs of loss within a specified time." The question as to the effect of the failure to furnish proofs within the time specified was not involved in that case, as, upon an examination of the facts of the case, it will be seen that it turned upon the effect of an absolute refusal to pay, which was held to waive the necessity for making any proofs of loss at all. In *Phenix Ins. Co. v. Searles*, 100 Ga. 97, it was held: "A statement made by such an agent to the insured, within the time during which the latter, under the terms of the policy, was allowed to furnish proofs of loss, that the company declined or refused to pay the loss, will amount to a waiver of such proofs; but where proofs of loss were not furnished within the time stipulated, a subsequent refusal to pay would not be such a waiver." The question as to whether a failure to furnish the proofs of loss within the time specified in the policy would work a forfeiture of the policy was not directly raised in that case, and the decision was based merely upon the assumption that such was the law. In addition to this, as will appear from the language in the fifth headnote, the policy was construed as meaning that a failure to furnish the proofs within the time limited would vitiate the policy, which would make the decision directly in line with the present ruling; but the facts will show that this was not a proper construction to be placed upon the policy, as the language used in the policy in that case was exactly the same as the language in the policy involved in the present case. The case of *Graham v. Niagara Ins. Co.*, 106 Ga. 840, does not conflict with the ruling made in the present case, it being simply held that when a policy stipulated that no suit should be brought thereon unless commenced before the expiration of twelve months from the date of the loss, and that the company should have sixty days after due notice and satisfactory proof of loss to pay the policy, there could be no recovery on such a policy when no notice of loss was given until such

a time that sixty days would not elapse between the date of the notice and the expiration of the time for bringing suit on the policy. While not directly in point, the reasoning of the decision is in line with the reasoning upon which the present ruling is based.

2. The policy sued on contained what is commonly called ~~the~~ the "iron-safe clause." That part of the clause which is material to the present investigation is in the following language: "The following covenant and warranty is hereby made a part of this policy: 1. The insured will take a complete itemized inventory of stock on hand at least once in each calendar year, and, unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within thirty days of issuance of this policy, or this policy shall be null and void from such date, and upon demand of the assured the unearned premium from such date shall be returned. . . . In the event of failure to produce such inventories for the inspection of this company, this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon." It appears from the plaintiffs' testimony that they had not taken an inventory of the stock of goods which was covered by the policy within twelve months prior to the date of the policy, nor did they take one within thirty days after date of its issuance. The plaintiffs introduced evidence tending to prove that the insurance was written on the very first day that they opened their store, and that they had on hand that day the invoices representing all purchases made by them, and that every article contained in the invoices was on that day in the store, and that they exhibited such invoices to the agent of the company who wrote the policy. It is contended by the plaintiffs that this was at least a substantial compliance with that portion of the iron-safe clause which required an inventory, and that, as loss occurred within less than twelve months from the date the policy was written, they are not precluded from recovering on the policy merely because they failed to take an inventory within thirty days. A clause of the character designated in the policy as the "iron-safe clause" has been held by this court to be valid, and to constitute a warranty and not a mere representation: *Scottish Union etc. Co. v. Stubbs*, 98 Ga. 754. In the opinion in that case Mr. Chief Justice Simmons uses this language: "This clause constitutes a promissory warranty. It binds the assured to do certain things for the protection of the

insurer, and is important as providing a check against fraud on the part of the assured, and a mode by which the insurer⁶³⁰ may ascertain for itself the extent of the loss; and the compliance of the assured with this part of the contract is a condition upon which, by the express terms of the contract, the validity of the policy is made to depend." The precise question presented for decision is whether a collection of invoices covering every article embraced within a stock of merchandise on a given day is an inventory of such stock within the meaning of the clause above quoted. In other words, was the insurer bound to treat these invoices, when exhibited to it, as an inventory of the goods?

An inventory is "an itemized list of the various articles constituting a collection, estate, stock in trade, etc., with their estimated or actual values": Black's Law Dictionary. It is a "list, schedule, or enumeration in writing, containing, article by article, the goods and chattels, rights and credits, and, in some cases, the land and tenements, of a person or persons": Bouvier's Law Dictionary. "An itemized list of goods or valuables, with their estimated worth; specifically, the annual account of stock taken in any business": Webster's Dictionary. "A list or catalogue of goods and chattels, containing a full, true, and particular description of each, with its value, made on various occasions, as on the sale of goods, decease of a person, storage of goods for safety, etc.": Encyclopaedic Dictionary. Invoice has been defined to be: "A statement on paper concerning goods sent to a customer for sale or on approval. It usually contains the price of the goods sent, the quantity and the charges upon them made to the consignee": Encyclopaedic Dictionary. "A list or account of goods or merchandise sent or shipped by a merchant to his correspondent, factor, or consignee, containing the particular marks of each description of goods, the value, charges, and other particulars": Black's Law Dictionary. "A list sent to a purchaser, factor, consignee, etc., containing the items, together with the prices and charges, of merchandise sent or to be sent to him": Standard Dictionary. A single invoice is certainly not an inventory, and it would seem to follow that a collection of invoices would not be an inventory. It may be that a collection of invoices, accompanied with a written statement signed by the insured that the invoices embraced every article in the store and the actual value of each, would be a substantial⁶³¹ compliance with the stipulation in the policy; but be this as it may, we are clear that the invoices alone are not

sufficient. It is too late at the trial for the insured to show that the invoices contained all of the goods with the actual value of each article, for the obvious reason that the insurer would have a right to decline to receive the invoices as a proper compliance with the terms of the policy, and this, of course, is the true test as to their sufficiency. An invoice is simply a writing showing the articles sold, with the selling price of each. This may vary greatly from the actual value of the articles. That property, including merchandise, is often bought and sold at prices which do not at all represent the actual value is a well-known fact. The invoice price of an article is a circumstance to be considered in determining what is its actual value, but it is far from conclusive on the question. To take an inventory, in common parlance, is "to take stock," that is to say, take an itemized list of every article in the store at the time of the inventory, with the actual value of each. The supreme court of Mississippi had before it a similar question, and from that decision the second headnote preceding this opinion is taken: *Home Ins. Co. v. Delta Bank*, 71 Miss. 608. Upon a careful examination of the facts of *Roberts v. Sun Mut. Ins. Co.*, 19 Tex. Civ. App. 338, the ruling there made will be found also to support the decision in the present case. The failure of the plaintiffs to take an inventory as required by the policy prevents a recovery by them, at least so far as the right to recover the value of the merchandise lost by the fire is concerned.

3. The policy sued on in the present case insured both the stock of goods and the building in which it was contained. The premium due upon the policy was a gross sum. The question arises, therefore, whether the breach of a warranty relating solely to the goods, and which precluded a recovery for their loss, would also bar a recovery for loss of the building. The stipulation prescribing that the insured must take an inventory of his stock provides that in case of failure so to do "this policy shall be null and void." What was the intention of the parties with respect to the question just above stated? If this intention is to be derived from the language used, and it must be, it would seem to be clear that the contract was entire and ⁶³² indivisible, and that the breach of a condition which would work a forfeiture would avoid the entire policy, and not simply a portion thereof. The parties contracted that "the policy" should be void in case of failure to comply with the iron-safe clause. The policy embraces insurance upon both the building and its contents, and the premium is payable in a

gross sum. "If the consideration to be paid is single and entire, the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items": 2 Parsons on Contracts, *519. It was competent for the parties to make two separate and distinct contracts, one covering the goods, and the other the building; but they did not see proper to do this. They combined the two and made the consideration moving toward the insurer a gross sum. They further provided that the contract, not a part of it, should be void under certain conditions. It may, perhaps, seem to be unreasonable that simply for a failure to take an inventory of the stock of goods the plaintiffs should be precluded from recovering the value of the building. But this does not affect the question. The question is, What have they agreed upon? If there was any room to doubt as to the intention of the parties, that construction which is most reasonable and most consonant with justice would be applied. But there is none. The parties have deliberately chosen to enter into an agreement whereby the policy shall be forfeited if the insured fails to do certain things; and he has failed to comply with this agreement. In such a case there is but one thing for the courts to do, and that is to enforce the agreement as made.

The question as to whether a policy of insurance such as is involved in the present case constitutes a separable or an entire contract is no new question. It has been the subject of numerous decisions by the courts in this country, and they are in hopeless and irreconcilable conflict. The weight of authority is to the effect that the contract is entire, and that the breach of a warranty which relates solely to one class of property will avoid the entire policy, if the contract so provides. Text-writers of great learning and ability have, after reviewing the decisions on both sides of this question, reached the conclusion that the contract is indivisible. We quote the following from 633 1 Wood on Fire Insurance, 384: "It is difficult to understand how it can be held that these contracts are several, when a gross premium is paid for the entire insurance. The court cannot say, as a matter of law, neither can the fact be shown, that the insurer would have been satisfied to take the risk separately at the same premium. By consenting to pay a gross premium for the insurance the assured has signified his willingness to let the policy stand as an entire contract, subject in all its parts to the conditions imposed by the insurer, and there is

neither reason nor equity in preventing [?] the assured after he has violated one of the conditions of the policy as to a part of the risk, to turn around and say that this condition only affected that portion of the risk to which the breach related." Mr. Ostrander, after an elaborate review of the decisions, reaches the conclusion that those which hold the contract to be entire announce the sounder and better rule: Ostrander on Fire Insurance, sec. 23 et seq. See, also, 2 Joyce on Insurance, sec. 1931; 1 May on Insurance, sec. 277. In support of the views herein announced we find the courts of last resort of Maine, Wisconsin, Maryland, Minnesota, Virginia, New Hampshire, Massachusetts, Vermont, Pennsylvania, New Jersey, Michigan, Indiana, Arkansas, Iowa, Alabama, and Connecticut. It would not be profitable here to do more than cite the decisions of these courts. Reduced to their last analyses they simply hold that the premium being for a gross sum evidences an intention on the part of the parties that the contract should be treated as entire, and that the intention of the parties, when ascertained, must be enforced: See *Richardson v. Maine Ins. Co.*, 46 Me. 394, 74 Am. Dec. 459; *Barnes v. Union etc. Ins. Co.*, 51 Me. 110, 81 Am. Dec. 562; *Hinman v. Hartford Fire Ins. Co.*, 36 Wis. 159 (7); *Burr v. German Ins. Co.*, 84 Wis. 76, 36 Am. St. Rep. 905; *Associated Firemen's Ins. Co. v. Assum*, 5 Md. 165; *Bowman v. Franklin Fire Ins. Co.*, 40 Md. 620; *Plath v. Minnesota Ins. Co.*, 23 Minn. 479, 23 Am. Rep. 697; *Moore v. Virginia etc. Ins. Co.*, 28 Gratt. 508, 26 Am. Rep. 373; *Baldwin v. Hartford Ins. Co.*, 60 N. H. 422, 49 Am. Rep. 324; *Friesmuth v. Agawam etc. Ins. Co.*, 10 Cush. 587, *Lee v. Howard Fire Ins. Co.*, 3 Gray, 583; *Kimball v. Howard Fire Ins. Co.*, 8 Gray, 33; *McGowan v. People's etc. Ins. Co.*, 54 Vt. 211, 41 Am. Rep. 843; *Gottzman v. Pennsylvania Ins. Co.*, 56 Pa. St. 210, 94 Am. Dec. 55; *Trustees etc. v. Williamson*, 26 Pa. St. 196; *Martin v. Insurance Co. of North America*, 57 N. J. L. 623; *Aetna Ins. Co. v. Resh*, 44 Mich. 55, 38 Am. Rep. 228; *McQueeney v. Phoenix Ins. Co.*, 52 Ark. 257, 20 Am. St. Rep. 179; *Garver v. Hawkeye Ins. Co.*, 69 Iowa, 202; *Western Assur. Co. v. Stoddard*, 88 Ala. 606; *Essex Sav. Bank v. Meriden Ins. Co.*, 57 Conn. 335.

It is true that none of the cases above cited dealt with a breach of the iron-safe clause, but in many of them the condition in the policy which was violated had no more connection with the property for which a recovery was sought than does the iron-safe clause to the building insured by the policy herein

involved. In principle the cases are exactly in point. Opposed to this view are decisions of the courts of last resort of Nebraska, Colorado, Kansas, and Missouri: See *State Ins. Co. v. Schreck*, 27 Neb. 527, 20 Am. St. Rep. 696; *German Ins. Co. v. Fairbank*, 32 Neb. 750, 29 Am. St. Rep. 459; *Fireman's Fund Ins. Co. v. Barker*, 6 Colo. App. 535; *German Ins. Co. v. York*, 48 Kan. 488, 30 Am. St. Rep. 313; *Kansas Farmers' Fire Ins. Co. v. Saindon*, 53 Kan. 623; *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247; *Trabue v. Dwelling-House Ins. Co.*, 121 Mo. 75, 42 Am. St. Rep. 523. The courts of New York and Indiana seem to have been at different times on both sides of the question now under consideration: *Smith v. Empire Ins. Co.*, 25 Barb. 497; *Kiernan v. Agricultural Ins. Co.*, 81 Hun, 373; 30 N. Y. Supp. 892; *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452, 29 Am. Rep. 184; *Pratt v. Dwelling-House Ins. Co.*, 130 N. Y. 206; *Havens v. Home Ins. Co.*, 111 Ind. 90, 60 Am. Rep. 689; *Phenix Ins. Co. v. Pickel*, 119 Ind. 155, 12 Am. St. Rep. 393. Our conclusion is, that where an insurance policy is issued in consideration of a gross premium, and provides that the policy shall be void in the event of a breach of a certain condition therein named, and this condition is broken, no recovery can be had on the policy, though separate classes of property are therein insured, and though the stipulation violated relates solely to a matter which could have no connection with but one of these classes.

4. As it affirmatively appeared from the evidence offered by the plaintiffs that they had broken one of the warranties in the policy, and as the breach thereof avoided the policy by an express provision in the same, the motion to nonsuit should have been sustained.

Judgment reversed.

All the justices concurring, except Little, J.

LITTLE, J., dissenting. Not being able to agree to the conclusion of law expressed in the third headnote, I dissent from the judgment rendered by a majority of the court.

INSURANCE, FIRE—IRON-SAFE CLAUSE.—In a policy of insurance covering a stock of goods, as well as store fixtures and furniture, separately valued, an "iron-safe" clause requiring the books of account and last inventory to be kept in a fire-proof safe does not apply to the furniture and fixtures. The contract is divisible, and is good as to the furniture and fixtures, though it may be avoided as to the goods by a failure to observe such clause: *Mitchell v. Mississippi Home Ins. Co.*, 72 Miss. 53, 48 Am. St. Rep. 535.

INSURANCE, FIRE—ENTIRETY OF CONTRACT.—If the amount of insurance is apportioned to distinct items, but the premium is paid in gross, the contract of insurance is entire: *McQueeney v. Phoenix Ins. Co.*, 52 Ark. 257, 20 Am. St. Rep. 179. See, too, *Manchester Fire Assur. Co. v. Glenn*, 13 Ind. App. 365, 55 Am. St. Rep. 225; *Stevens v. Queen Ins. Co.*, 81 Wis. 335, 29 Am. St. Rep. 905. Compare *German Ins. Co. v. York*, 48 Kan. 488, 30 Am. St. Rep. 313.

INSURANCE, FIRE—PROOF OF LOSS.—If an insurance policy provides that notice of loss shall be given within six days, and that proof of loss shall be furnished within thirty days after notice of loss, but does not provide that failure to render such proof within the time named shall operate as a forfeiture of the policy, a failure to furnish the proof within the time prescribed merely postpones the maturity of the claim and does not work a forfeiture of the policy: *Vangindertaelen v. Phoenix Ins. Co.*, 82 Wis. 112, 33 Am. St. Rep. 29.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

BOOTH v. PEOPLE.

[186 Illinois, 43.]

POLICE POWER—WHAT IS.—A LEGISLATURE, in the absence of any constitutional prohibition, may lawfully prohibit all things hurtful to the comfort, safety, and welfare of society, though the prohibition invades the right of liberty or property of an individual. This power is known as the police power of the state.

CONSTITUTIONAL LAW—WHAT ACTS MAY BE MADE CRIMINAL.—The state may deprive a citizen of liberty or property by "due process of law," which phrase is synonymous with "law of the land." Hence the law of the land may expressly prohibit and make criminal the doing of an act which, in the absence of such law, would constitute a liberty or property right within the meaning of the constitution, even though such act is not within itself immoral.

POLICE POWER—VALID REGULATION—GRAIN OPTION CONTRACTS.—A statute declaring grain option contracts to be gambling contracts, and the making of them to be a criminal offense, is a valid police regulation, for it does not deprive any person of liberty or property without due process of law or deny to him the equal protection of the law.

A STATUTE DECLARING GRAIN OPTION CONTRACTS TO BE GAMBLING CONTRACTS, and the making of them to be a criminal offense, is not unconstitutional on the ground that it fails to embrace all kinds of personal property. The act need not embrace all contracts to buy or sell, but only all of such contracts as lie at the root of the evil which threatens the public safety and welfare; and when it does this, it does not deny to any person the equal protection of the law.

The statute violated was section 130 of the Criminal Code of Illinois, which provides that "whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold," shall be fined, etc. It also provides

that "all contracts made in violation of this section shall be considered gambling contracts and shall be void."

Lee D. Mathias, for the plaintiff in error.

E. C. Akin, attorney general, Charles S. Deneen, state's attorney, Albert C. Barnes, and W. E. Caylor, for the people.

⁴⁶ BOGGS, C. J. The plaintiff in error was convicted and adjudged to pay a fine of one hundred dollars under an indictment which charged that he, on the sixteenth day of August, 1899, in said county of Cook, in the state of Illinois aforesaid, unlawfully did contract in writing with the Weare Commission Company, a corporation, to then and there have to himself, to wit, ⁴⁷ to said Alfred V. Booth, a certain option to buy at a future time, to wit, on or before the twenty-sixth day of August, in the year of our Lord one thousand eight hundred and ninety-nine, a certain commodity, to wit, grain, to wit, ten thousand bushels of corn, from the said Weare Commission Company, a corporation as aforesaid, which said contract is in the words and figures as follows, to wit:

"Alfred V. Booth, Grain and Provision Broker.

"Chicago, Aug. 16, 1899.

Sep. Corn, 1899

"10 Weare Com. Co.

C 31½

Paid

"Good till close of change Sat. Aug. 26, 1899.

"WEARE C. CO.

"J. J. C."

—contrary to the statute and against the peace and dignity of the same people of the state of Illinois. The evidence explained the writing set out in the indictment to constitute an agreement giving defendant the option to buy ten thousand bushels of corn at thirty-one and one-half cents per bushel from the Weare Commission Company at any time within ten days after the sixteenth day of August, 1899. The allegations of fact set forth in the indictment were fully established by the evidence.

Counsel for plaintiff in error contends it did not appear from the proof the plaintiff in error entered into the contract with any other than the bona fide intention to accept the corn if he desired to avail himself of the benefit of the contract, or that he had any intent, when the contract was executed, to accept compliance with the contract merely by way of the payment to him of the difference between the contract price and the market price of the corn at the time of the maturity of the con-

tract, and further contends it appeared from the evidence that the contract was in fact consummated by the actual delivery of the grain to him. Counsel for defendant in error do not question the position thus taken by counsel ⁴⁸ for plaintiff in error as to the facts proven on the hearing. Counsel for plaintiff in error admits the facts so charged in the indictment, and established by the evidence in support thereof, justified the conviction under the provisions of section 130 of the Criminal Code, as interpreted by this court in *Schneider v. Turner*, 130 Ill. 48, but insists: 1. Said section 130 is in contravention of the provision incorporated in the constitution of the United States and also in the constitution of the state of Illinois, that "no person shall be deprived of life, liberty, or property without due process of law"; and 2. That said section is violative of the provision of section 1 of the fourteenth amendment of the constitution of the United States, which provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." We will consider these points in order as made by counsel.

1. Liberty and property, as used in said constitutional provisions, include the right to acquire property, and that means and includes the privilege of contracting and making and enforcing contracts: *Frerer v. People*, 141 Ill. 171. A citizen cannot be deprived of an attribute of property, like the right to make a reasonable contract with reference to property, without "due process of law." Due process of law is a general public law of the land: *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869; *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315. The general assembly of the state of Illinois possesses full plenary power of legislation, except in so far as its powers are limited by the state or federal constitution. The state inherently possesses, and the general assembly may lawfully exercise, such power of restraint upon private rights as may be found to be necessary and appropriate to promote the health, comfort, safety, and welfare of society. This power is known as the police power of the state. In the exercise of this power the general assembly may, by valid enactments—i. e., "due process of law"—prohibit all things hurtful to the comfort, safety, ⁴⁹ and welfare of society, even though the prohibition invade the right of liberty or property of an individual: 18 Am. & Eng. Ency. of Law, 739, 740; *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191, 22 Am. Rep. 71. An enactment to have that effect and be valid must be an appropriate measure for the pro-

motion of the comfort, safety, and welfare of society. It must be, in fact, a police regulation. Courts are authorized to interfere and declare a statute unconstitutional, or not the "law of the land," if it conflicts with the constitutional rights of the individual and does not relate to or is not an appropriate measure for the promotion of the comfort, safety, and welfare of society: *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315. With the wisdom, policy, or necessity for such an enactment courts have nothing to do. But what are the subjects of police powers, and what are reasonable regulations are judicial questions, and the courts may declare enactments which, under the guise of the police power, go beyond the great principle of securing the safety or welfare of the public, to be invalid.

Laws for the suppression of all forms of gambling have, without exception, so far as we are advised, been regarded by the courts and law writers as a proper exercise of the police power. This is conceded by counsel for plaintiff in error, but his contention is, the contract for entering into which the plaintiff in error was convicted is neither illegal nor within itself immoral—is neither void nor voidable under principles of the common law; that this court so declared in *Schneider v. Turner*, 130 Ill. 28, and that it is not within the power of the state, in virtue of the police power, to deprive a citizen of the right guaranteed by the constitutions of the United States and of the state of Illinois to enter into a contract which is not within itself harmful, immoral, or injurious to the health, morals, or safety of the public. The proposition is, a contract which within itself is not harmful, immoral, or illegal, and which constitutes a right of property or liberty, within the meaning of those words as employed ⁵⁰ in the organic law of the federal and state governments, cannot be denounced as illegal in the exercise of the police power of the state. This would be to place a limitation upon the police power which might greatly impair its usefulness and often render its proper exercise entirely futile. It would restrict its operation to declaring that illegal which was already illegal. As we have hereinbefore said, it is not without the power of the general assembly, in the proper exercise of the police power, by an enactment otherwise valid, to declare that unlawful which was theretofore lawful, even if the act so condemned be an attribute of the right of liberty or property guaranteed to the citizen by the constitutional provisions under consideration. The language of the constitutional provision is so chosen as to recognize the right

of the state to deprive a citizen of life, liberty, or property by "due process of law." Due process of law is synonymous with "law of the land," hence the law of the land may expressly prohibit and make criminal the doing of an act which, in the absence of such law of the land, would constitute a liberty or property right within the meaning of the constitution, even though such act be not within itself immoral.

In *Magner v. People*, 97 Ill. 320, it was urged that certain provisions of the then existing game laws of the state, which declared it unlawful for anyone to have in his possession wild fowl or birds of the kind designed to be protected by the statute, which had been lawfully taken or killed in another state, were in contravention of clause 8 of article 1 of the constitution of the United States, which confers upon Congress the power to regulate commerce among the several states. It was there held that the object of the statute was the protection of the game therein mentioned, and that the prohibition of "all possession and sales" of such game would tend to their protection and thereby advance the ends to be secured by the legislation, and the conviction of the plaintiff ⁵¹ in error, *Magner*, of the offense of having quail in his possession which had been killed in the state of Kansas and sold by the said *Magner* in this state was upheld, and it was there said (page 331): "This is but one among many instances to be found in the law where acts, which in and of themselves alone are harmless enough, are condemned because of the facility they otherwise offer for a cover or disguise for the doing of that which is harmful."

The practice of gambling on the market prices of grain and other commodities is universally recognized as a pernicious evil, and that the suppression of such evil is within the proper exercise of the police power has been too frequently declared to be open to discussion. The evil does not consist in contracts for the purchase or sale of grain to be delivered in the future in which the delivery and acceptance of the grain so contracted for is bona fide contemplated and intended by the parties, but in contracts by which the parties intend to secure, not the article contracted for, but the right or privilege of receiving the difference between the contract price and the market price of the article. The object to be accomplished by the legislation under consideration is the suppression of contracts of the latter character, which are in truth mere wagers as to the future market price of the article or commodity which is the subject matter of the wager. Clearly, a contract which gives to one of the

contracting parties a mere privilege to buy corn, but does not bind him to accept and pay for it is wanting in the elements of good faith to be found in a contract of purchase and sale where both parties are bound, and offers a more convenient cover and disguise for mere wagers on the price of grain than contracts which create the relation of vendor and vendee. Such contracts are in the nature of wagers, that contracted for being the mere privilege to buy the grain should its market value prove to be greater than the price fixed in the contract for such privilege. The prohibition of the right to enter into contracts ^{and} which do not contemplate the creation of an obligation on the part of one of the contracting parties to accept and pay for the commodity which is the purported subject matter of the contract, but only to invest him with the option or privilege to demand the other contracting party shall deliver him the grain if he desires to purchase it, tends materially to the suppression of the very evil of gambling in grain options which it was the legislative intent to extirpate, for the reason such evil injuriously affected the welfare and safety of the public. The denial of the right to make such contracts tended directly to advance the end the legislature had in view and was not an inappropriate measure of attack on the evil intended to be eradicated. So far as that point is concerned, the act must be deemed a valid law of the land, and as such must be enforced, though it infringe in a degree upon the property rights of citizens. To that extent private right must be deemed secondary to the public good.

2. Nor do we think the enactment in question denies to any person the equal protection of the law. Its penalties are directed against all persons and classes of persons who offend against its provisions. It is true it does not prohibit contracts for options to buy or sell, or the purchase or sale on future delivery of all kinds and classes of property; nor was it necessary to the validity of the act it should reach and prohibit all contracts of that character. The remedy need only be as comprehensive as the evil the law designed to remove. In considering as to the propriety of adopting the enactment and as to the necessary scope of the proposed legislation, it is fair to assume it was present in the legislative mind that the proposed prohibition of the right to contract was an infringement upon the rights of property and liberty of the individual, and that it was the legislative design to trench only in the slightest possible degree upon private and individual right, and for that rea-

son the ⁵³ act was so framed as to restrict the operation thereof to transactions in such kinds and character of property, commodities, and securities as had been made the subject of gambling or wagering contracts and out of which grew the evil which threatened the welfare and safety of the public, and to place no restraints upon contracts which, though of like character of those which were prohibited, had not been employed as a means of gambling. Counsel insist contracts to have or give options to buy or sell other articles, commodities, or securities than those specified may be lawfully made, but do not suggest that the practice had grown up of contracting to have or give options to be settled merely by way of "differences" in any articles or commodities other than those comprehended within the statute. It is not indispensable, in order to be constitutional, the section should embrace all kinds of personal property, whether such kinds of personal property had usually or commonly been the subject of option dealing or not. It is sufficient if the selection of the articles and property mentioned in the section is based on reasonable and just grounds of difference, and the prohibition comprehends all kinds of property within the relations and circumstances which constitute the distinction, and extends equally to every citizen and all classes of citizens, and denies to no one a privilege which another is permitted under like circumstances to exercise or employ. The prohibition need not embrace all contracts for options to buy or sell, but only all of such contracts as lie at the root of the evil which threatens the public safety and welfare.

We think the enactment the valid law of the land. The judgment is affirmed.

Acts Which the Legislature may and may not Declare Criminal.*

"*Criminal*" is a word used in this note to denote some act or omission relating to, or having the character of, a crime; and any offense against the public good and the first principles of justice and common honesty is regarded as a crime. In a limited sense, the word

***REFERENCE TO MONOGRAPHIC NOTES.**

How far the state may regulate or prohibit the sale of intoxicating liquors: 26 Am. Dec. 331-339.

Constitutionality of Sunday laws: 49 Am. Dec. 616-623.

Municipal ordinances, reasonableness and validity of: 35 Am. Rep. 702, 703.

Statutes prohibiting adulteration of milk: 51 Am. Rep. 347-354.

Power of state to regulate or prohibit sale or manufacture of articles: 1 Am. St. Rep. 644-650.

The fourteenth amendment considered with relation to special privileges, burdens, and restrictions: 25 Am. St. Rep. 870-890.

Constitutionality of state regulations of interstate commerce: 27 Am. St. Rep. 547-563.

Game laws: 42 Am. St. Rep. 133-144.

Quarantine and health laws and regulations: 47 Am. St. Rep. 533-552.

Criminal uses of the United States mails: 58 Am. St. Rep. 595-603.

"crime" embraces offenses of a serious or atrocious character, but in this note it is used in its more extended sense, which comprehends every violation of public law. In other words, a "crime" is herein considered as any offense for which any criminal punishment may be inflicted. The word "crime" of itself includes every offense, from the highest to the lowest in the grade of offenses: *Commonwealth v. Dennison*, 24 How. 66, 99; and "it is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted 'in violation of a public law, either forbidding or commanding it'": *United States v. Eaton*, 144 U. S. 677, 687. A "crime" is any wrong which the state deems injurious to the public at large, and punishes through a judicial proceeding in its name; but, though an act is criminal by the common law, it cannot be regarded as a "crime" in a state by whose laws no judicial proceedings can be maintained for its punishment: *Patterson v. Natural etc. Life Ins. Co.*, 100 Wis. 118, 69 Am. St. Rep. 899. As said in the principal case, a state inherently possesses, and the legislature may lawfully exercise, such power of restraint upon private rights as may be found necessary and appropriate to promote the health, comfort, safety, and welfare of society. This power is known as the police power of the state, and in determining what acts the legislature may or may not make criminal, it is necessary to know what is within, and what is without, the police power of the state.

Police Power is that attribute of sovereignty in a state by which it clothes the legislature with power to regulate persons and property in accordance with the provisions of the state constitution in all matters relating to the public health, the public morals, and the public safety: *Stehmeyer v. City Council*, 53 S. O. 259, 282; *State v. Moore*, 104 N. O. 714, 17 Am. St. Rep. 696. It may also be added that whatever is contrary to public policy or inimical to the public interests is subject to the police power of the state: *Louisville etc. R. R. Co. v. Kentucky*, 161 U. S. 677, 701. The exercise of such power is limited to this field: *Ruhstrat v. People*, 185 Ill. 133, 76 Am. St. Rep. 30; but the particular subjects to which the power applies have not been, and necessarily cannot be, defined with precision. They are determined by "the gradual process of judicial inclusion and exclusion": *Chicago etc. R. R. Co. v. State*, 47 Neb. 549, 53 Am. St. Rep. 557, and note. The police power, under our system of government, has been left to the states, and the only limit to its exercise in the enactment of laws is that they shall not prove repugnant to the provisions of the state or national constitution: *State v. Moore*, 104 N. O. 714, 17 Am. St. Rep. 696; but the general government doubtless has a power over its own property analogous to the police power of the several states: *Camfield v. United States*, 167 U. S. 518, 525; and Congress has the same police powers in the District of Columbia that the state legislatures have within their several jurisdictions: *Lansburgh v. District of*

Columbia, 11 App. Cas. (D. C.) 512. The deposit in Congress of the power to regulate commerce between the states is not intended to rob the latter of their police power. Under such power they may legislate to promote domestic morals, order, and safety, to secure general comfort, health, and prosperity, to prevent crime, pauperism, disturbance of the peace, and all forms of social evils, and to protect the lives, limbs, quiet, and property of all their citizens: *Burdick v. People*, 149 Ill. 600, 41 Am. St. Rep. 829; *State v. Powell*, 58 Ohio St. 324; *State v. Harrington*, 68 Vt. 622, 627. The power of a state to restrain or prohibit all things hurtful to the comfort, safety, or welfare of society extends to almost everything within its borders—to the suppression of nuisances; to the prohibition of manufactures deemed injurious to the public health; to the prohibition of intoxicating drinks, their manufacture or sale; to the prohibition of lotteries, gambling, horseracing, or anything else that the legislature may deem opposed to the public welfare: See note to *People v. Wemple*, 27 Am. St. Rep. 565; *Ford v. State*, 85 Md. 465, 60 Am. St. Rep. 337. "The first right of a state, as of a man, is self-protection," says Caldwell, J., in *Harbison v. Knoxville Iron Co.*, 103 Tenn. 421, 76 Am. St. Rep. 682, "and with the state that right involves the universally acknowledged power and duty to enact and enforce all such laws, not in plain conflict with some provision of the state or federal constitution, as may rightly be deemed necessary or expedient for the safety, health, morals, comfort, and welfare of its people. This power is an important and comprehensive one, and its application must be expected and allowed to expand and take in new subjects from time to time, as trade and business advance and new conditions arise. The scope of its exercise, within the bounds already mentioned, is limited only by the requirement that it shall not arbitrarily and unreasonably affect the citizen in his life, liberty, and property": See, also, *Ford v. State*, 85 Md. 465, 60 Am. St. Rep. 337.

The police power, however, cannot be made an excuse for oppressive and unjust legislation: *Harbison v. Knoxville Iron Co.*, 103 Tenn. 421, 76 Am. St. Rep. 682; *State v. Broadbelt*, 89 Md. 565, 73 Am. St. Rep. 201; *Ex parte Brown*, 38 Tex. Cr. Rep. 295, 70 Am. St. Rep. 743. Laws enacted in the exercise of the police power must be police regulations in fact, and if they do not conduce to any legitimate police purpose, but amount to an arbitrary and unwarranted interference with the right of the citizen to pursue any lawful business, they must be declared unconstitutional: *State v. Chicago etc. Ry. Co.*, 68 Minn. 381, 64 Am. St. Rep. 482; for the police power, however broad and extensive, is not above the constitution, and must be exercised in subordinancy to it: *State v. Goodwill*, 33 W. Va. 179, 25 Am. St. Rep. 863; *Stehmeyer v. City Council*, 53 S. C. 259. Constitutional rights cannot be abridged by legislation under the guise of police regulation: *State v. Julow*, 129 Mo. 163, 50 Am. St. Rep. 443; *Ruhrat v. People*, 185 Ill. 133,

76 Am. St. Rep. 30. The legislature is the judge of when the necessity for an exercise of the police power exists, but the reasonableness of its exercise is a question for the courts. In other words, it belongs to the legislature to exercise the police power of the state subject to the power of the courts to adjudge whether any particular law invades rights secured by the constitution: *Cleveland etc. Ry. Co. v. People*, 175 Ill. 359, 367; *Ruhstrat v. People*, 185 Ill. 133, 76 Am. St. Rep. 30; *Mugler v. Kansas*, 123 U. S. 623, 661; *Colon v. Lisk*, 153 N. Y. 188, 60 Am. St. Rep. 609. In order to sustain legislative interference with the business of a citizen by virtue of the police power, either under a statute or a municipal ordinance, it is necessary that the act should have some reasonable relation to the subjects included in such power. It must tend in some degree toward the prevention of offenses, or preservation of the public health, morals, safety, or welfare; and where a statute is sought to be upheld as a proper exercise of the police power, the court should examine it for the purpose of ascertaining whether the health, morals, safety, or welfare of the public justifies its enactment. If the statute has no real or substantial relation to those subjects, it is the duty of the court to so adjudge: *Chicago v. Netcher*, 183 Ill. 104, 75 Am. St. Rep. 93; *People v. Warden*, 157 N. Y. 116, 68 Am. St. Rep. 763; *Ex parte Brown*, 38 Tex. Cr. Rep. 295, 70 Am. St. Rep. 743; *People v. Havnor*, 149 N. Y. 195, 200, 52 Am. St. Rep. 707. But if such measures have been adopted as have some relation to, and have some tendency to accomplish, the desired end, and do not violate some provision of the constitution, a court cannot assume to determine whether they are wise or the best that might have been adopted: *State v. Chicago etc. Ry Co.*, 68 Minn. 381, 64 Am. St. Rep. 482. When the interests of individuals conflict with the rights of the public, the individual interest must, of course, yield to the paramount right: *Commonwealth v. Hubley*, 172 Mass. 58, 70 Am. St. Rep. 242.

The Legislature possesses the whole legislative power of the people, except so far as such power may be limited by the constitution: *People v. Cannon*, 139 N. Y. 32, 36 Am. St. Rep. 668; and the right of a state to interfere with the use of private property by its owner belongs to the police power of the state: *State v. Roby*, 142 Ind. 168, 51 Am. St. Rep. 174. The only limitations upon the power of the legislature are those imposed by the state constitution, the federal constitution, and valid treaties and acts of Congress: *Townsend v. State*, 147 Ind. 624, 62 Am. St. Rep. 477; and this applies to its power to define and declare public offenses: *People v. West*, 106 N. Y. 293, 60 Am. Rep. 452. Legislative power to declare what acts shall be deemed criminal, and punished as such, does not extend to declaring that to be a crime which in its nature is and must under all circumstances be innocent, nor can it, in defining crimes or in declaring their punishment, take away or impair any inalienable right secured by the constitution. But it may, acting

within these limits, make acts criminal which before were innocent, and ordain punishment in future cases where none before could have been inflicted: *Lawton v. Steele*, 119 N. Y. 226, 16 Am. St. Rep. 813; and see *People v. West*, 106 N. Y. 293, 60 Am. Rep. 452. A penalty is a punishment imposed for breach of a duty imposed by law, and the legislature cannot delegate to an executive body the power to impose a penalty for the violation of a rule or regulation, though the legislature fixes the maximum of such penalty: *Harbor Commrs. v. Redwood Co.*, 88 Cal. 491, 22 Am. St. Rep. 821.

Due Process of Law.—The constitutional guaranty is, that no person shall be deprived of life, liberty, or property without due process of law; but a valid exercise of the police power does not deprive any person of life, liberty, or property without due process of law: *State v. Holden*, 14 Utah, 71, 87. And when a legislature defines an offense and prescribes a punishment for it, it is not essential that it should be prosecuted by indictment. An information, instead of an indictment, is sufficient to constitute "due process of law," in a criminal prosecution, where the state has provided in its laws that crimes may be prosecuted by information: *Hodgson v. Vermont*, 168 U. S. 262; *McNulty v. California*, 149 U. S. 645; *Hurtado v. California*, 110 U. S. 516; *Rowan v. State*, 30 Wis. 129, 11 Am. Rep. 559; *State v. Boswell*, 104 Ind. 541; *In re Dolph*, 17 Colo. 35; *Bolln v. State*, 51 Neb. 581.

Criminal Intent.—One who does a thing forbidden by statute is liable to the punishment therein imposed, though in so doing it he had no evil intent, unless the statute makes such intent an element of the crime; and proof of guilty knowledge or intent is not essential in a prosecution therefor: *State v. Zichfeld*, 23 Nev. 304, 62 Am. St. Rep. 800; *People v. Snowberger*, 113 Mich. 86, 67 Am. St. Rep. 449; note to *Farrell v. State*, 30 Am. Rep. 619; *People v. West*, 106 N. Y. 293, 60 Am. Rep. 452; *People v. Welch*, 71 Mich. 548, 552; *Commonwealth v. Raymond*, 97 Mass. 567; *Commonwealth v. Dowling*, 114 Mass. 259; *Hill v. State*, 62 Ala. 168; *State v. White Oak etc. Corp.*, 111 N. C. 661; *State v. Hurds*, 19 Neb. 316. If a statute has made it criminal to do an act under peculiar circumstances, one who voluntarily does it under those circumstances is charged with the criminal intent of doing it; *State v. Zichfeld*, 23 Nev. 304, 62 Am. St. Rep. 800. Thus, an honest mistake by a magistrate as to age will not excuse him for joining minors in marriage without the consent of parents or guardians: *Beckham v. Nacke*, 56 Mo. 546; and the statute may punish as a criminal the ignorant seller of an adulterated or forbidden article: *Commonwealth v. Farren*, 9 Allen, 489; *United States v. Bayand*, 16 Fed. Rep. 376, 384; *People v. Snowberger*, 113 Mich. 86, 67 Am. St. Rep. 449; *State v. Kittelle*, 110 N. C. 560, 28 Am. St. Rep. 698; *Commonwealth v. Weiss*, 139 Pa. St. 247, 23 Am. St. Rep. 182. So one guilty of a violation of the liquor laws in selling alcohol to

a minor cannot excuse the crime on the ground that the intoxicant was sold by his clerk, and not by himself: *Snider v. State*, 81 Ga. 753, 12 Am. St. Rep. 350. It is no defense that such a sale was made without his knowledge and contrary to his instructions: *State v. Kittelle*, 110 N. C. 560, 28 Am. St. Rep. 698. See, also, *State v. Sasse*, 6 S. Dak. 212, 55 Am. St. Rep. 834. Intent constitutes no element of the crime of misdemeanor. Hence innocence of intention does not entitle one accused of a misdemeanor to an acquittal if he has committed acts constituting a misdemeanor: *Haggerty v. St. Louis etc. Storage Co.*, 143 Mo. 238, 65 Am. St. Rep. 647. But where the statute makes a guilty intent an element of the crime, it must exist before a conviction can be had: *People v. Welch*, 71 Mich. 548. Hence whether or not a criminal intent or guilty knowledge is a necessary element of a statutory offense is, in some cases, a matter of construction, to be determined from the language of the statute, in view of its manifest purpose and design: *Commonwealth v. Weiss*, 139 Pa. St. 247, 23 Am. St. Rep. 182. Having shown the general constitutional principles which must govern legislatures in declaring acts to be criminal, illustrations will now be given showing some particular acts which a legislature has power to declare criminal, and others over which it has no such power.

Abandonment of Children.—In Georgia a father's willful and voluntary abandonment of his child, leaving it in a dependent and destitute condition, is a misdemeanor: *Gay v. State*, 105 Ga. 599, 70 Am. St. Rep. 68; and in New York the neglect of a parent to provide for an infant child of tender years is an indictable misdemeanor: *Matter of Ryder*, 11 Paige, 185, 42 Am. Dec. 109; and see, also, *Cowley v. People*, 83 N. Y. 464, 38 Am. Rep. 464.

Adulteration of Milk.—See Dairy Products, *infra*.

Animals.—A statute making it unlawful for the owner of hogs to permit them to run at large is a proper exercise of the police power. The owner is not deprived of his property without due process of law: *Haigh v. Bell*, 41 W. Va. 19, 23. Under the code of North Carolina, cruelty to fowls, such as chickens, is a misdemeanor. Hence under that code one may be successfully prosecuted for cruelty to animals where he needlessly and willfully kills his neighbor's trespassing chickens: *State v. Neal*, 120 N. C. 613, 58 Am. St. Rep. 810.

Buildings.—A city may prohibit the erection or reconstruction, in wood, of buildings within its "fire limits": *State v. O'Neil*, 49 La. Ann. 1171. It is a valid police regulation, though no attempt is made to constitute a crime in any other sense than the violation of a lawful ordinance: *State v. O'Neil*, 49 La. Ann. 1171. A statute requiring tenement houses in a city, previously erected, to be furnished by the owners with water, in sufficient quantity at one or more places on each floor occupied or intended to be occupied by one or more families, whenever they shall be directed to do so by

the board of health, is constitutional. Such a provision is not only a guard to the public health, but is a protection against fire, and is a proper exercise of the police power: *Health Dept. v. Rector*, 145 N. Y. 32, 45 Am. St. Rep. 579. No punishment or penalty could be inflicted, however, for the violation of such a statute, without a trial: *Health Dept. v. Rector*, 145 N. Y. 32, 45 Am. St. Rep. 579. If a statute provides that a city, with a specified population, may establish a building line on a boulevard, to which all structures thereon must conform, but does not provide for condemnation or notice to the owner, it is no crime to violate the provisions of an ordinance passed in pursuance of such statute, for the act deprives persons of property without due process of law: *St. Louis v. Hill*, 116 Mo. 527.

Burial and Removal of the Dead.—A city having power under its charter to regulate the burial of the dead has, it seems, power to determine for itself the localities in the city in which such burial shall be permitted, and to make a violation of its ordinances concerning such burial a misdemeanor: *Austin v. Austin City Cem. Assn.*, 87 Tex. 330, 335, 47 Am. St. Rep. 114. A statute making it criminal to disinter or remove from the place of burial the remains of any deceased person without a permit, for which a fee of ten dollars must be paid, is a sanitary measure within the police power of the state, and does not contravene the provision of the federal constitution as to interstate commerce. Such act is, therefore, constitutional: *In re Wong Yung Quy*, 6 Saw. 442.

Carriers.—Public storage and warehouse business is subject to the police power of the state, but a statute requiring railway and transportation companies to turn over to a licensed storage company or public warehouseman all property which the consignee fails to call for or receive within twenty days after notice of its arrival, and making a failure to do so a misdemeanor, is unconstitutional, for such a requirement is not a lawful exercise of the police power of the state: *State v. Chicago etc. Ry. Co.*, 68 Minn. 381, 64 Am. St. Rep. 482.

Cheats, Frauds, and Impositions.—One of the undoubted subjects of the police power is the protection of the public from imposition and fraud: See monographic note to *People v. Wemple*, 27 Am. St. Rep. 565, on the constitutionality of state regulations of interstate commerce; and laws providing for the detection and prevention of fraud are, as a general proposition, free from constitutional objection: *People v. Wagner*, 86 Mich. 594, 24 Am. St. Rep. 141. Thus, the state may make it a misdemeanor for one to be an itinerant vender of drugs and nostrums, and publicly professing to cure diseases and injuries, without a license. Such a statute is not a regulation of interstate commerce, but a valid exercise of the police power of the state, and is constitutional: *State v. Wheelock*, 95 Iowa, 577, 58 Am. St. Rep. 442. An ordinance may also regulate the weight of bread loaves, and punish a violation thereof: *People v. Wagner*, 86 Mich.

594, 24 Am. St. Rep. 141. The state may institute any reasonable preventive remedy when the frequency of fraud, or the difficulty experienced by individuals in circumventing it, is so great that no other means will prove efficacious: *People v. Wagner*, 86 Mich. 594, 24 Am. St. Rep. 141. A statute "for the protection of landlords, proprietors, or keepers of hotels and boarding-houses" does not violate that provision of a constitution which forbids imprisonment for debt, or that which forbids the making of laws giving any special privileges or immunities: *Ex parte King*, 102 Ala. 182; *State v. Yardley*, 95 Tenn. 546. Contra, *Hutchinson v. Davis*, 58 Ill. App. 358. A statute declaring it to be a misdemeanor to fraudulently obtain hotel accommodations, or to fraudulently remove baggage, to defraud the proprietor is not invalid, as authorizing imprisonment for debt, as the imprisonment is inflicted for the debtor's fraud and not for his debt: *State v. Yardley*, 95 Tenn. 546, 561. So a statute which makes it an indictable offense to procure advances by false promises to begin work is not unconstitutional. The offense denounced by this statute is not the failure to comply with the contract, but the fraud in making it to obtain advances with intent to cheat and defraud: *State v. Norman*, 110 N. C. 484, 489.

Coal Mining.—A statute prohibiting the mining for coal within five feet of the boundary line of another's land, without his consent, and imposing a penalty for so doing, is a valid exercise of the police power of the state: *Maple v. John*, 42 W. Va. 30, 57 Am. St. Rep. 839. But a statute making that an offense, if committed by a person engaged in one branch of coal mining, which, if done by persons in another branch of the same business, is lawful, without any reason for distinction between the two, is unconstitutional. Thus, a distinction between operators who sell their product at the mine to some shipper who ships it away to the market, and those who themselves ship their coal by rail or water, is purely arbitrary, and cannot be sustained. Neither can a law which deprives men engaged in the business of coal mining from contracting with each other for the purpose of ascertaining the weight of the coal mined or the amount due them, in any manner mutually satisfactory, be sustained. Hence a conviction for violating a law containing these features must be set aside: *Harding v. People*, 160 Ill. 459, 52 Am. St. Rep. 344.

Compulsory Vaccination.—The legislature has power to pass an act compelling vaccination, and whenever an epidemic of smallpox is existing, or may be reasonably apprehended, it may, in the exercise of its police power, confer upon a municipal corporation authority to make and enforce ordinances requiring all persons therein, or who come within its limits, to submit to vaccination, under a penalty of fine or imprisonment: *Morris v. Columbus*, 102 Ga. 792, 66 Am. St. Rep. 243; *State v. Hay*, 126 N. C. 999, post, p. 691; for danger to the public health is a sufficient ground for the exercise of the police power in restraint of a person's liberty: *Morris v.*

Columbus, 102 Ga. 792, 66 Am. St. Rep. 243. A statute providing for the vaccination of all children attending the public schools, and for the exclusion of unvaccinated children therefrom, is a constitutional exercise of the police power of the legislature: *Abeel v. Clark*, 84 Cal. 226; *Bissell v. Davison*, 65 Conn. 183. Compare the monographic note to *Hurst v. Warner*, 47 Am. St. Rep. 546, on quarantine and health laws and regulations.

Conspiracies Injurious to Trade and Commerce are made misdemeanors in the state of New York. An unlawful agreement to raise the price of coal is a conspiracy of this character: *People v. Sheldon*, 139 N. Y. 251, 86 Am. St. Rep. 690. So if two or more persons conspire by their intimidations or molestation to deter or influence another in the way he should employ his industry, his talents, or his capital, they are guilty of a criminal offense: *Crump v. Commonwealth*, 84 Va. 927, 10 Am. St. Rep. 895.

Dairy Products.—Statutes prohibiting the sale of adulterated milk, or milk to which water or any foreign substance has been added, or the sale as pure milk of any milk from which any cream has been removed, and declaring a violation of the prohibition to be a criminal offense, are constitutional and valid: *State v. Campbell*, 64 N. H. 402, 10 Am. St. Rep. 419; *People v. West*, 106 N. Y. 293, 60 Am. Rep. 452; *State v. Smyth*, 14 R. I. 100, 51 Am. Rep. 344, and extended note; *Commonwealth v. Smith*, 103 Mass. 444. A person may be convicted of selling adulterated milk although he did not know it to be adulterated: *Commonwealth v. Farren*, 9 Allen, 489. An act prescribing certain sanitary regulations to be observed by dairymen and other individuals who supply milk to cities, towns, and villages, and which imposes a fine for any violation thereof, makes a reasonable classification of persons by whom the sale of impure milk would be especially injurious to the public, and the act, being applicable to all persons of that class, is valid, although other persons selling milk to individuals in the country are not included within its regulations. Such regulations are a valid exercise of the police power of the state designed to protect the public health: *State v. Broadbelt*, 89 Md. 565, 73 Am. St. Rep. 201. Compare the subdivisions *Oleomargarine* and *Pure Food Laws*, *infra*.

Employer and Employé.—A statute making it a misdemeanor for a laborer to violate a contract made with a land owner after receiving supplies is constitutional: *State v. Chapman*, 56 S. C. 420, 76 Am. St. Rep. 557; but a statute declaring that to be a crime which consists alone in the exercise of a constitutional right, as that of terminating a contract, is unconstitutional: *State v. Julow*, 129 Mo. 163, 50 Am. St. Rep. 443. The power to prohibit an employer from exercising his constitutional right to insist that his employé shall not belong to a trade or labor union is not within the police power of the state. Hence a statute making it an offense for an employer to impose as a condition to employment or continued employment, that his employé shall not belong to a trade or labor union, is

unconstitutional and void as class or special legislation: *State v. Julow*, 129 Mo. 163, 50 Am. St. Rep. 443. So a statute which attempts to make it a crime for an employer to insist, and to impose as a condition of employment or continued employment, that his employé shall withdraw from or refrain from joining any trade or labor union is further unconstitutional and void, as seeking to deprive the employer of a constitutional right without due process of law: *State v. Julow*, 129 Mo. 163, 50 Am. St. Rep. 443.

A city ordinance making it a misdemeanor for any contractor employed under contract with the city to employ any person to work more than eight hours a day, or to employ Chinese labor under such contract, is an attempt to prevent certain parties from employing others in a lawful business and paying them for their services, is a direct infringement of the right of such persons to make and enforce their contracts, and is unconstitutional and void so far as it attempts to create a crime: *Ex parte Kuback*, 85 Cal. 274, 20 Am. St. Rep. 226. So with a law restricting the right of females to contract for labor. A statute declaring that no female shall be employed in any factory or workshop more than eight hours in any one day, or forty-eight hours in any one week, is an attempted infringement upon the constitutional rights of the employer and the employé, and must, therefore, be adjudged void under a constitutional provision to the effect that no person shall be deprived of life, liberty, or property without due process of law: *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315. And a statute declaring that it shall be unlawful for any person, firm, or corporation engaged in mining or manufacturing, and interested in merchandising, to knowingly and willfully sell any merchandise or supplies to any employé at a greater per cent of profit than when selling merchandise or supplies of like quality, character, and quantity to other customers buying for cash, and not employed by them, is void, because it is class legislation, and an unjust interference with the rights, privileges, and property of both the employer and the employé: *State v. Fire Creek etc. Coke Co.*, 33 W. Va. 188, 25 Am. St. Rep. 891; *In re Scrip Bill*, 23 Colo. 504. So a statute which provides that no employer shall impose a fine upon or withhold the wages or any part of the wages of an employé engaged at weaving "for imperfections that may arise during the process of weaving," and which provides a penalty for a violation of its provisions, is unconstitutional as interfering with the right "of acquiring, possessing, and protecting property": *Commonwealth v. Perry*, 155 Mass. 117, 31 Am. St. Rep. 533.

An act making it a criminal offense, punishable by a fine, for persons or corporations engaged in any mining or manufacturing business to keep a store, or to control any store, shop, or scheme for the furnishing of supplies, tools, clothing, provisions, or groceries to employés while the latter are engaged in such business is unconstitutional and void as class legislation: *Frorer v. People*, 141 Ill. 171.

And a statute making it a misdemeanor for any person, firm, or corporation engaged in manufacturing or mining to issue any order, check, etc., in payment of labor, except such as is payable in money, is class legislation, is violative of the constitutional guaranty of "due process of law," and is void: *State v. Loomis*, 115 Mo. 307; *State v. Goodwill*, 33 W. Va. 179, 25 Am. St. Rep. 863.

Statutes regulating the hours of labor and making it a criminal offense for an employer to violate them are held in Massachusetts and Utah to be a valid exercise of the police power, and constitutional: *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383; *State v. Holden*, 14 Utah, 71; affirmed in *Holden v. Hardy*, 169 U. S. 366; *State v. Holden*, 14 Utah, 96; *Short v. Bullion-Beck etc. Min. Co.*, 20 Utah, 20. The "eight-hour law," in Utah, is intended as a legislative protection for the employé in certain employments: *Short v. Bullion-Beck etc. Min. Co.*, 20 Utah, 20, and it is there held that a law may be limited to the dangers peculiar to a particular industry, such as laboring underground in a mine or working in a concentrating mill for the reduction of ores, without denying to any person the equal protection of the law: *State v. Holden*, 14 Utah, 71, 96. Other state statutes, however, which restrict the hours of labor, and make their violation, on the part of employers, a criminal offense, are held to be unconstitutional, on the ground, among others, that it is not competent for the legislature to single out certain industries and impose upon them restrictions with reference to their employés' hours of labor from which other employers of labor are exempt; that laborers have a constitutional right to make their own contracts, which cannot be impaired by legislative enactments; and that, there being no injury to the public, it is not a valid exercise of the police power for the legislature to prohibit an adult person from working more than a certain number of hours per day, on the ground that working longer may, or probably will, injure his own health: *In re Morgan*, 26 Colo. 415, 77 Am. St. Rep. 269; *In re House Bill*, 21 Colo. 29; *Low v. Rees Printing Co.*, 41 Neb. 127, 43 Am. St. Rep. 670; *Seattle v. Smyth*, Wash., April, 1900; *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315. These cases deny the validity of "eight-hour laws."

Failure to Provide.—The failure of a husband to support his wife is sometimes made a statutory offense: *Poole v. People*, 24 Colo. 510, 65 Am. St. Rep. 245; and where he leaves his wife or children a burden on the public, he is, under the statute, deemed a disorderly person: *People v. Malsch*, 119 Mich. 112, 75 Am. St. Rep. 381.

Fish and Game—Laws Concerning.—The preservation of fish and game has always been treated as within the proper domain of the police power, and laws prescribing the time and manner in which fish may be caught, and limiting the season within which birds and wild animals may be caught, have been repeatedly upheld by the courts: *Lawton v. Steele*, 152 U. S. 133, 138. "The duty," says Mr.

Justice Brown, in *Lawton v. Steele*, 152 U. S. 133, 139, "of preserving the fisheries of a state from extinction by prohibiting exhaustive methods of fishing, or the use of such destructive instruments as are likely to result in the extermination of the young as well as the mature fish, is as clear as its power to secure to its citizens, as far as possible, a supply of any other wholesome food." The legislature, therefore, undoubtedly has power not only to prohibit fishing by seines or nets in waters of the state, but to make it a criminal offense: *Lawton v. Steele*, 152 U. S. 133, 139; *People v. Bridges*, 142 Ill. 30, 35; and a law making it a misdemeanor to take fish, with certain exceptions, in any other manner than by angling for them with hook and line is not unconstitutional: *State v. Mrozinski*, 59 Minn. 465; *Lawton v. Steele*, 52 U. S. 133, 135, 139.

A statute declaring seines and nets, used contrary to law, in fishing, to be a public nuisance is valid: *Bittenhaus v. Johnston*, 92 Wis. 588; *Lawton v. Steele*, 152 U. S. 133, 139; and the legislature has the power to order the destruction of the property thus denounced by it as a public nuisance, when found in such unlawful use, at least where it is of trifling value; for where it prohibits the use of seines or nets in fishing, it has power to take such measures as are reasonable and necessary to prevent such offenses in the future, and it cannot do this more effectually than by destroying the means of the offense: *Lawton v. Steele*, 152 U. S. 133; *Bittenhaus v. Johnston*, 92 Wis. 588. A statute which regulates the method and times of catching fish in waters of the state is not invalid as class legislation on the ground that it makes different regulations for different waters, or applies to certain localities or waters only, or wholly exempts certain waters from all such regulations. Neither does it deny to any person "the equal protection of the laws" merely because it discriminates between different localities and waters and between different kinds of fish: *Bittenhaus v. Johnston*, 92 Wis. 588, 594, 596.

A statute making it a misdemeanor for any person to have in his possession any gill net or seine is valid: *Lewis v. State*, 148 Ind. 846. But a statute making it a misdemeanor for anyone to have in his possession certain varieties of fish during certain months is unconstitutional, as depriving a person of his property without due process of law, in so far as the statute affects the possession and sale of fish imported from without the state, and on which a customs duty has been paid: *People v. Buffalo Fish Co.*, 30 Misc. Rep. 130; 62 N. Y. Supp. 543. "In so far, then," said Lambert, J., in the case last cited, "as the forestry, game, and fisheries law imposes a penalty upon those having bass, pike, pickerel, and muskellunge in their possession during the closed season, such fish being subjects of interstate or foreign commerce, it is in conflict with both the federal and state constitutions, and is without force or effect. The object of the statute is to protect the game fishes in the waters of the state, and that object is not promoted by depriving citizens of

their property in fish which have been caught and killed outside of the jurisdiction of the state, and which have become component parts of commerce; and the law cannot, therefore, be sustained as an exercise of the police power, except as it deals with those fish which have been taken within the jurisdiction of the state." The court of appeals, however, though it affirmed the judgment in this case, did so upon the ground that the statute assailed did not apply to fish imported from beyond the state. Respecting the views stated in the foregoing quotation, the members of the court of appeals expressing their opinions were equally divided: *People v. Buffalo Fish Co.*, 164 N. Y. 93, 79 Am. St. Rep. 622. So an act to further regulate "fishing for profit" in the waters of the state is unconstitutional where it is a local or special law, and discriminates in favor of citizens of certain counties, thereby denying to others the equal protection of the laws: *State v. Higgins*, 51 S. C. 51. A statute, however, which grants to citizens of one state certain fishing rights is not a discrimination against the "privileges" of citizens of the several states, within the meaning of the federal constitution: *State v. Tower*, 84 Me. 444; and a statute making it unlawful to fish in certain rivers, within certain points, "with seine or nets, except from the shore in the usual and customary manner," is not unconstitutional because it discriminates in favor of shore owners or occupants: *Hughes v. State*, 87 Md. 298. A state may regulate fishing within its navigable waters: *State v. Woodward*, 123 N. C. 710; *Hughes v. State*, 87 Md. 298. A statute making it criminal to sell trout during the close season is constitutional, and may be enforced though the trout sold have been artificially propagated and maintained: *Commonwealth v. Gilbert*, 160 Mass. 157.

A state legislature also has power to enact laws for the preservation of other game than fish in the state, and the constitutionality of such legislation cannot be questioned. The power to legislate on this subject is part of the police power inherent in each state: *American Exp. Co. v. People*, 133 Ill. 649, 23 Am. St. Rep. 641. The state may, therefore, prohibit the taking of wild game and any traffic or commerce in it, if deemed necessary for its protection or preservation, or the public good, and to this end may make it criminal for any person to sell, or offer for sale, any of such game, whether killed within or without the state: *Ex parte Maler*, 103 Cal. 476, 42 Am. St. Rep. 129. Persons permitted by law to kill, but not to sell, game have only a qualified property in it after it is killed. They may use it themselves, but cannot lawfully sell it to others: *American Exp. Co. v. People*, 133 Ill. 649, 23 Am. St. Rep. 641. If a statute declares that every person in the state who shall at any time sell, or offer for sale, the hide or meat of any deer, elk, antelope, or mountain sheep, shall be guilty of a misdemeanor, its application, it has been held, extends to, and includes, the selling of the hide or meat of any of such animals though lawfully killed beyond the state: *Ex parte Maler*, 103 Cal. 476, 42 Am.

St. Rep. 129. A conviction under such statute may be sustained if the article sold, though imported into the state from another, was not in the original package: *Ex parte Maier*, 103 Cal. 476, 42 Am. St. Rep. 129. So, in Ohio, it has been held that a statute making it criminal for a person to have in his possession, or to purchase or sell, certain game birds or animals at the times designated therein is constitutional, though applicable to birds or animals lawfully killed in another state and shipped to the state wherein such killing would be unlawful: *Roth v. State*, 51 Ohio St. 209, 46 Am. St. Rep. 566. That a state may absolutely prohibit the importation and sale of game and fish during a closed season, or during the entire year, although lawfully acquired in another state, and though not an article of food deleterious in itself, see *People v. O'Neil*, 110 Mich. 324, 328.

The mere possession of game may be made a criminal offense, though imported from another state, and, in the latter event, such a law is not invalid as unlawfully restricting interstate commerce: *People v. O'Neil*, 110 Mich. 324; *Roth v. State*, 51 Ohio St. 209, 46 Am. St. Rep. 566; *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140; *State v. Rodman*, 58 Minn. 393; and a statute making it a misdemeanor for any person to have in his possession any game birds or animals, or any flesh, pieces, or parts thereof, during the season when the catching or killing thereof is prohibited, applies to such birds or animals, or any part thereof, though killed within the open season: *Haggerty v. St. Louis etc. Storage Co.*, 143 Mo. 238, 65 Am. St. Rep. 647; *State v. Rodman*, 58 Minn. 393. A statute making it unlawful to purchase, sell, expose for sale, or have in possession any of the birds mentioned therein, but declaring that its provisions shall not be construed to apply to any common carrier into whose possession any of the birds or game shall come in the regular course of their business, while in transit to the state from any place without the state where the killing of such birds or game shall be lawful, applies to game killed beyond the state, and makes the sale or the having in possession such game in this state unlawful: *Roth v. State*, 51 Ohio St. 209, 46 Am. St. Rep. 566. There are, however, some cases which hold that the possession or sale of game killed in another state is not an offense: *Commonwealth v. Wilkinson*, 139 Pa. St. 298; *Commonwealth v. Hall*, 128 Mass. 410, 35 Am. Rep. 387; *People v. Buffalo Fish Co.*, 62 N. Y. Supp. 543; 164 N. Y. 93, 79 Am. St. Rep. 622.

The state, in the exercise of its police power, may impose such limitations and restrictions upon the right of property in game, after it is taken or killed, as tends to prevent its extermination or undue depletion: *State v. Chapel*, 64 Minn. 130, 58 Am. St. Rep. 524. It may therefore enact a statute making it unlawful for any carrier to transport game killed in the state, knowing the same to have been sold, or knowing that it is to be sold or offered for sale; and any carrier transporting game in violation of such statute will be amenable to the penalty prescribed thereby: *American Exp. Co. v. People*, 133 Ill. 649, 23 Am. St. Rep. 641. So, a statute making it

"unlawful for any person to consign by common carrier to any commission merchant or sale market, at any time, any elk, moose, caribou, or deer, or any part thereof, except the skin or head," is not unconstitutional as depriving citizens of their privileges and property without due process of law: *State v. Chapel*, 64 Minn. 130, 58 Am. St. Rep. 524. But a statute imposing a penalty upon any person killing, destroying, or having in his possession, between the first days of October and January, more than one moose, two caribou, or three deer does not prohibit common carriers from having more than three deer in their possession between said days for the purposes of transportation: *Bennett v. American Exp. Co.*, 83 Me. 236, 23 Am. St. Rep. 774. A county ordinance forbidding all persons, under a penalty, to transport game lawfully taken to the place where they desire to use or dispose of it is violative of the right of private property and void: *Ex parte Knapp*, 127 Cal. 101; but a game law is not invalid because it provides greater restrictions and severer penalties against nonresidents than against residents, nor because it makes the penal character of the acts depend on the by-laws of game protection societies: *Allen v. Wyckoff*, 48 N. J. L. 90, 57 Am. Rep. 548. See, generally, the monographic note to *Ex parte Maler*, 42 Am. St. Rep. 138-144, on game laws.

Fraudulent Banking.—In some of the states fraudulent banking—that is, receiving a deposit knowing the bank to be insolvent—is made a criminal offense: *State v. Elfert*, 102 Iowa, 188, 63 Am. St. Rep. 433; *Robertson v. People*, 20 Colo. 279. It is not unconstitutional to make such an offense embezzlement, and is not a deprivation of liberty or property without due process of law, for the banking business is affected with a public interest and is subject to regulation within the general police power: *Meadowcraft v. People*, 163 Ill. 56, 54 Am. St. Rep. 447; and a statute making the failure of a banker within thirty days after receiving a deposit prima facie evidence of an intent on his part to defraud is constitutional: *Meadowcraft v. People*, 163 Ill. 56, 54 Am. St. Rep. 447. A statute which makes it a misdemeanor for "any banker" to discount any note, bill, or draft at a usurious rate of interest, is not an unlawful exercise of class legislation: *Youngblood v. Birmingham etc. Sav. Co.*, 95 Ala. 521, 36 Am. St. Rep. 245.

Free Speech, Right of.—Publicly professing to treat diseases while an itinerant vender of drugs, nostrums, etc., without a license, is an indictable offense under the Iowa statute, which is held not to contravene the constitutional provision guaranteeing the right to speak and write: *State v. Bair*, 92 Iowa, 28. And a city ordinance forbidding, under penalty of a fine, any person, not having a permit from the mayor, from making "any public address" in or upon any of the public grounds of the city is constitutional. The words "public address" apply to sermons delivered on such grounds: *Commonwealth v. Davis*, 162 Mass. 510, 44 Am. St. Rep. 389; affirmed in *Davis v. Massachusetts*, 167 U. S. 43. "The fourteenth

amendment to the constitution of the United States does not," said Mr. Justice White, "destroy the power of the states to enact police regulations as to the subjects within their control, and does not have the effect of creating a particular and personal right in the citizen to use public property in defiance of the constitution and laws of the state": *Davis v. Commonwealth*, 167 U. S. 43, 47.

Game and Fish.—See *Fish and Game*, *supra*.

Hawkers or Peddlers.—A statute forbidding the sale of goods, wares, and merchandise by any person as a hawker or peddler, within a certain territory within a state, is a valid exercise of the police power, and not unconstitutional as a regulation of interstate commerce: *Commonwealth v. Gardner*, 133 Pa. St. 284, 19 Am. St. Rep. 645. But a city ordinance requiring nonresident hawkers or peddlers of merchandise not grown or manufactured in the county in which such city is situated to pay a license fee, under penalty of a fine, is unconstitutional: *Graffy v. Rushville*, 107 Ind. 502, 57 Am. Rep. 128.

Horseracing.—An act making horseracing and race meetings, except at intervals stated therein, a misdemeanor, and prescribing a penalty, is a legitimate exercise of the police power of the state: *State v. Roby*, 142 Ind. 168, 51 Am. St. Rep. 174; and the legislature, in the exercise of such power, may declare book-making and pool-selling to be a crime: *State v. Burgdoerfer*, 107 Mo. 1, 33; but an act which makes book-making and pool-selling "at any other place than upon the premises of regular racecourses," a misdemeanor, is unconstitutional and void, for it violates the right to constitutional equality, the equal protection of the law: *State v. Bliler*, 138 Mo. 139; *State v. Walsh*, 136 Mo. 400. Betting on horseraces, under the Tennessee statute, is indictable as gaming, unless the race is run within a substantial inclosure and the bet is made within such inclosure; and this is declared not to be vicious class legislation: *Debardelaben v. State*, 90 Tenn. 649.

Insurance Matters.—A state has power to impose such conditions as it may please upon the doing of any business within its borders by foreign insurance companies, and it may lawfully make it a criminal offense for agents of foreign insurers and brokers, who have not complied with its laws, to solicit or act therein in regard to foreign insurance: *Commonwealth v. Nutting*, 175 Mass. 154, *post*, p. 483; *Commonwealth v. Roswell*, 173 Mass. 119; *Hooper v. California*, 155 U. S. 648; *Pierce v. People*, 106 Ill. 11, 46 Am. Rep. 683; although the contract is made out of the state: *Pierce v. People*, 106 Ill. 11, 46 Am. Rep. 683; and provides that such agents shall be deemed agents of the insured: *Pierce v. People*, 106 Ill. 11, 46 Am. Rep. 683; and see *Commonwealth v. Nutting*, 175 Mass. 154, *post*, p. 483. The state, however, could not recover a penalty for violating its laws as to foreign insurance, where the policy, an open one, was issued outside the state, at a certain place, at which the premiums were paid and at which the losses were to be paid, and the only act done within the state was the mailing of a

letter describing certain cotton to which the defendant, the insured, desired the policy to attach: *Allgeyer v. Louisiana*, 165 U. S. 578; reversing *State v. Allgeyer*, 48 La. Ann. 104.

The legislature may also make it criminal for a person to act as an insurance agent without a license therefor, although the property insured is not within the state: *Commonwealth v. Roswell*, 178 Mass. 119; and a statute making it criminal for the agent of a life insurance company to pay a rebate to induce a person to effect an insurance in a company is constitutional, and may be enforced against the agent of a foreign insurance company doing business in this state: *People v. Formosa*, 131 N. Y. 478, 27 Am. St. Rep. 612. The agents of foreign insurance companies who are carrying on business within the state may also be convicted of violating an "act to declare unlawful trusts and combinations in restraint of trade and products, and to provide penalties therefor." The word "trade," as used in such statute, does not mean interstate commerce; and it may therefore be made to cover the transactions of such agents without placing its provisions in conflict with the powers of Congress to regulate commerce among the several states: *State v. Phipps*, 50 Kan. 609, 34 Am. St. Rep. 152.

Interstate Commerce.—An act concerning some of the subjects of interstate commerce may be made a crime, under certain circumstances. Thus, to kill game for the purpose of transporting it beyond the state limits, or to have it in possession for such purpose, may be made a criminal offense, without violating the interstate commerce clause of the federal constitution: *Geer v. Connecticut*, 161 U. S. 519, 522, 535. But the general rule is that the United States has exclusive control of that which belongs to interstate commerce. Thus, cigarettes are a recognized commercial commodity, and their sale in the original package cannot be made a criminal offense: *McGregor v. Cone*, 104 Iowa, 465, 65 Am. St. Rep. 522; *State v. Goetze*, 43 W. Va. 495, 64 Am. St. Rep. 871. Contra, *Austin v. State*, 101 Tenn. 563, 70 Am. St. Rep. 703, holding that cigarettes are not legitimate articles of commerce; that, in the absence of congressional legislation to the contrary, a state statute may prohibit the importation and sale of cigarettes within the state without violating the inhibition against state regulation of interstate commerce; and that a state statute making it criminal to sell cigarettes manufactured within the state is valid as an internal police regulation.

A state legislature cannot prohibit the importation and sale, within the state, of a pure article of commerce, so long as it remains in the original package. Hence, a state cannot prohibit the importation and sale in the state of pure oleomargarine made in imitation and semblance of butter: *Fox v. State*, 89 Md. 381, 73 Am. St. Rep. 193; *Schollenberger v. Pennsylvania*, 171 U. S. 1. Contra, *Commonwealth v. Huntley*, 156 Mass. 236, holding that the state may forbid the sale of oleomargarine made in imitation of "yellow butter," though it has been imported from another state. But

while a state may not have power to totally exclude an article of interstate commerce, it may so regulate the introduction of an imported article as to insure purity: *Schollenberger v. Pennsylvania*, 171 U. S. 1, 14. A state may pass all laws necessary to prevent deception and fraud in the sale, within its limits, of articles in whatever state manufactured, or from whatever state imported or introduced. Hence a state may make it a criminal offense to sell impure and deleterious oleomargarine, whether made in the state or elsewhere, and whether sold as butter or oleomargarine: *Fox v. State*, 89 Md. 381, 73 Am. St. Rep. 193. See, also, *Schollenberger v. Pennsylvania*, 171 U. S. 1, 14. A statute prohibiting and making criminal the sale of oleomargarine unless it has been colored pink has been held constitutional, though applicable to that manufactured without, as well as within, the state. Such a statute has for its object the prevention of fraud on the public, and is therefore within the police power of the state, and it is operative although the article has been imported in original packages: *State v. Myers*, 42 W. Va. 822, 57 Am. St. Rep. 887. Contra, *Collins v. New Hampshire*, 171 U. S. 80, holding such a statute invalid, as being, in necessary effect, prohibitory. "Pink," said Mr. Justice Peckham, delivering the opinion of the court, "is not the color of oleomargarine in its natural state. The act necessitates and provides for adulteration. It enforces upon the importer the necessity of adding a foreign substance to his article, which is thereby rendered unsalable, in order that he may be permitted lawfully to sell it. If enforced, the result could be foretold. To color the substance as provided for in the statute naturally excites a prejudice and strengthens a repugnance up to the point of a positive and absolute refusal to purchase the article at any price." Under a statute directed especially against the sale of oleomargarine as an article of food, a state has power, it has been held, to punish, as a crime, sales of oleomargarine contained in small tubs not exceeding ten pounds in weight, and suitable for the retail trade. Such a tub is not an original package, and to punish its sale does not interfere with interstate commerce: *Commonwealth v. Paul*, 170 Pa. St. 284, 50 Am. St. Rep. 776.

The statute of Virginia making it a crime to offer for sale, within the limits of that state, any fresh meats (beef, veal, or mutton) from animals slaughtered one hundred miles or over from the place at which it is offered for sale, unless it has been previously inspected and approved by local inspectors, for whom a compensation is provided, to be paid by the owner of the meats, but which act does not require the inspection of fresh meats from animals slaughtered within one hundred miles from the place in that state at which such meats are offered for sale, is void, because it is a restraint upon commerce among the states, and imposes a discriminating tax upon the products and industries of some other states in favor of the products and industries of that state: *Brimmer v. Rebman*, 138 U. S. 78, 82, 83. So a statute of that state, since repealed, which

provided that all flour brought into the state and offered for sale therein should be reviewed and have the Virginia inspection marked thereon, which allowed the inspector an inspection fee of two cents for each barrel inspected, and which imposed a penalty for offering such flour for sale without such inspection, was held by the same court to be a discriminating law, repugnant to the commerce clause of the federal constitution: *Voight v. Wright*, 141 U. S. 62.

A state statute making it a crime for one to be an itinerant vender of drugs and nostrums, and to publicly profess to cure diseases and injuries without a license, does not interfere with interstate commerce, and is a valid exercise of the police power of the state: *State v. Wheelock*, 95 Iowa, 577, 58 Am. St. Rep. 442.

A statute requiring a party, who desires to deal in convict-made goods, manufactured in other states, to obtain a license therefor or suffer a penalty for violating the law, is void as interfering with the interstate commerce clause of the federal constitution: *Arnold v. Yanders*, 56 Ohio St. 417, 60 Am. St. Rep. 753. So a statute which makes it a crime for prison-made goods to be exposed for sale or sold, unless they are so stamped as to show when and where they were made, and that they are the product of prison labor, is void as an attempted regulation of interstate commerce when applied to goods manufactured in another state: *People v. Hawkins*, 157 N. Y. 1, 68 Am. St. Rep. 736. See the subdivisions, *Cheats, Frauds, and Impositions, Fish and Game, Hawkers or Peddlers, and Insurance Matters, supra, and Sunday Laws, infra.*

Intoxicating Liquors.—There is no inherent right in a citizen to sell intoxicating liquors by retail; it is not a privilege of a citizen of the state or of a citizen of the United States. It is a business attended with danger to the community, and may, in the exercise of the police power of the state, and without violating the constitution or laws of the United States, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils: *Crowley v. Christensen*, 137 U. S. 86, 91, per Mr. Justice Field. To the same effect, see, also, *Mugler v. Kansas*, 123 U. S. 623, 662; *Giozza v. Tiernan*, 148 U. S. 657, 662; *Cantini v. Tillman*, 54 Fed. Rep. 969; *Welsh v. State*, 126 Ind. 71, 77; *State v. Aiken*, 42 S. C. 222; *Hunzinger v. State*, 39 Neb. 653. "Were it not for statutory restrictions and prohibitions," says Coffey, J., in *Welsh v. State*, 126 Ind. 71, 77, "every person would be as free to engage in the business of manufacturing and selling intoxicating liquor as he would be to engage in the manufacture and sale of any other property. It is not true, as is sometimes argued, that the citizen derives his right to sell intoxicating liquor from the particular state in which he sells. In selling he is but exercising his common-law right. All laws regulating and imposing burdens on the business are prohibitory in their character. There is no difference between an absolute prohibitory law, a law providing for local option, and a license law, except in the extent to which they prohibit the manufacture and sale of intoxicating drinks. An absolute prohibitory law deprives all within its

reach from engaging in the business; a local option law prohibits all within a given locality from selling within that locality; while a license law prohibits all within the state, who have not obtained a license, from engaging in the business of retailing intoxicating liquors. Each of these is a restriction upon the common-law right of the individual citizen. The first wholly deprives him of the right, while the other two prohibit him to a limited extent. Acting upon the just assumption that the unrestricted sale of intoxicating liquors results in much evil, and that it is detrimental to society, the law-making power of each state in the Union has, in the exercise of its police power, assumed to control, regulate, or prohibit the business as seemed to it best. The extent to which such power shall be exercised must, of necessity, be left to the law-making power of the state exercising such right." Compare the monographic note to *Commonwealth v. Kimball*, 85 Am. Dec. 831-839, on how far the state may regulate or prohibit the sale of intoxicating liquors.

In the exercise of its power to prohibit the sale of intoxicating liquors, the state may declare a violation of its prohibition to be a crime. In other words, the legislature may make it criminal for one to sell intoxicating liquors contrary to law: *State v. Mugler*, 29 Kan. 252, 44 Am. Rep. 634; affirmed in *Mugler v. Kansas*, 123 U. S. 623; *Commonwealth v. Kimball*, 24 Pick. 359, 85 Am. Dec. 826; *State v. Hodgson*, 66 Vt. 134; *Ex parte Swann*, 96 Mo. 44. Thus, the sale of intoxicating liquors to a minor may be made a crime, without regard to the question of intent or knowledge that it was sold to one under age: *In re Carlson's License*, 127 Pa. St. 330, 333; *Boatright v. State*, 77 Ga. 717; *Loeb v. State*, 75 Ga. 258; *State v. Hartfiel*, 24 Wis. 60; *State v. Sasse*, 6 S. Dak. 212, 55 Am. St. Rep. 834; unless the statute makes intent an ingredient of the offense: *People v. Welch*, 71 Mich. 548; and the same principle applies to the offense of permitting minors to remain in a saloon: *State v. Probasco*, 62 Iowa, 400. One who sells intoxicating liquor to a minor, though innocently ignorant of the fact, violates and incurs the penalty of a law prohibiting such sales, even where the purchaser makes affidavit that he is over twenty-one years old; but evidence of good faith and honest intention should be considered in mitigation of the penalty: *State v. Sasse*, 6 S. Dak. 212, 55 Am. St. Rep. 834.

The state may lawfully make it a crime to sell or give intoxicating liquors to a common drunkard: *People v. Bray*, 105 Cal. 344; or to any Indian, whether he has adopted the habits of civilization or not, and become a citizen of the United States: *State v. Wise*, 70 Minn. 99; *People v. Bray*, 105 Cal. 344. It may also make it criminal to employ females in places where intoxicating liquors are sold as a beverage: *State v. Considine*, 16 Wash. 858; *In re Considine*, 83 Fed. Rep. 157; and a statute or ordinance prohibiting the sale of liquors in any place where women or minors are em-

ployed is a proper exercise of police regulation, and constitutional: *State v. Reynolds*, 14 Mont. 383; *Ex parte Hayes*, 98 Cal. 555.

It may also be made a crime to sell whisky within two miles of a church: *State v. Groves*, 121 N. C. 632; and any place kept and maintained for the illegal manufacture and sale of intoxicating liquors may be declared by the state to be a common nuisance, and at the same time it may provide for the indictment and trial of the offender: *Mugler v. Kansas*, 123 U. S. 623; affirming *State v. Mugler*, 29 Kan. 252, 44 Am. Rep. 634. By act of Congress any liquors imported into a state immediately become subject to its police laws even while in the original packages of importation: *Cantini v. Tillman*, 54 Fed. Rep. 969, 973; *In re Langford*, 57 Fed. Rep. 570. But a municipal ordinance making it unlawful for any person, firm, or corporation to expose for sale or sell any intoxicating, malt, or fermented liquor in any place of business where clothing, jewelry, hardware, or drygoods are sold is unreasonable and void as to a drygoods dealer who sells intoxicating liquor in sealed packages only and not for consumption on the premises. Such restriction is purely arbitrary, and is an illegal discrimination, not having any connection with, and not tending in any way toward, the protection of the public against the evils arising from the sale of intoxicating liquors: *Chicago v. Netcher*, 183 Ill. 104, 75 Am. St. Rep. 93.

The mere keeping, however, of liquors by a person in his possession, whether for himself or another, unless he does so for the illegal sale thereof, or for some other improper purpose, cannot injure or affect the health, morals, or safety of the public. Hence a statute prohibiting such keeping in possession is not a legitimate exercise of the police power, but it is an abridgment of the privileges and immunities of the citizen, without any legal justification, and therefore void. An attempt by the legislature to make the keeping of liquor by one citizen for another in a local option territory, whether in a house, tent, or anywhere else, and whether for a consideration or without, a crime, or an attempt on the part of the legislature to make it criminal for a person who may be the owner or proprietor of any building, in local option territory, to take an order for another person for intoxicating liquors, to be sent or delivered to the proprietor or owner of such house for the person giving such order, is without authority of law, as violative of the citizen's fundamental right to use his own property as he pleases, not injuring another person, and it is not competent for the legislature, under its power of police regulation, to impair the legal ownership and holding of one's property, either by himself or by another person: *Ex parte Brown*, 38 Tex. Cr. Rep. 295, 70 Am. St. Rep. 743.

Lotteries and gift enterprises may be lawfully forbidden: *Douglas v. Kentucky*, 168 U. S. 488. Laws for the suppression of lotteries are in the interest of the morals and welfare of the people of the

state, and are therefore a legitimate exercise of its police powers. Hence the legislature may make it a crime for anyone to have lottery tickets in his possession, whether he knows what they are or not: *Ford v. State*, 85 Md. 465, 60 Am. St. Rep. 837. So where the conducting of a lottery is made an offense by a municipal ordinance, the fact that one knowingly has lottery tickets in his possession, or knowingly gives information of a drawing or a pretended drawing, makes him guilty of the act of being engaged in "conducting a lottery": *State v. Voss*, 49 La. Ann. 444, 62 Am. St. Rep. 653. A municipal ordinance may also, in the exercise of its police power, make it unlawful for anyone to keep a "lottery office": *State v. Riley*, 49 La. Ann. 1617; or to sell, barter, exchange, or otherwise dispose of any lottery ticket or token of any kind, except as authorized by the laws of the state: *State v. Dobard*, 45 La. Ann. 1412. It may be remarked here that the Louisiana State Lottery Company is a corporation recognized by the constitution of the state of Louisiana, and that a city ordinance prohibiting the sale of lottery tickets in a city of that state does not discriminate favorably to that company, because the city is powerless to control the action of the state in the premises: *State v. Dobard*, 45 La. Ann. 1412, 1414, 1415.

Miscegenation.—Intermarriage between whites and negroes may be made a crime by the legislature, and it is no defense that the guilty parties were ignorant of the law: *Dodson v. State*, 61 Ark. 57. A white person and a colored person, lawfully married in one state, are subject to prosecution in another state for living together as man and wife, or for lewd cohabitation, where the laws of the latter state forbid marriages between white persons and negroes: *State v. Bell*, 7 Baxt. 12, 32 Am. Rep. 549; *Kinney v. Commonwealth*, 30 Gratt. 858, 32 Am. Rep. 690.

Natural Gas, Waste of.—No one has an inalienable right to waste his property, such as natural gas, to the injury of the public; and a statute which declares that it is a waste of natural gas to burn it in flambeau lights, and which forbids such use under penalty of a fine, does not violate those provisions of the federal constitution providing that no person shall be deprived of his property without due process of law. Such declaration of the legislature is conclusive on the courts, and such statute making it a crime to waste natural gas is a valid exercise of the police power, and constitutional: *Townsend v. State*, 147 Ind. 624, 62 Am. St. Rep. 477. So a statute making it unlawful to permit the flow of gas or oil from a well into the open air, and prescribing a penalty for its violation, is not unconstitutional: *State v. Ohio Oil Co.*, 150 Ind. 21; affirmed in *Ohio Oil Co. v. Indiana*, 177 U. S. 190; *Ohio Oil Co. v. State*, 150 Ind. 698; affirmed in *Ohio Oil Co. v. Indiana*, 177 U. S. 212, 213.

Nuisance.—A legislature undoubtedly has power to declare what shall constitute a public nuisance, and to make provisions for its abatement: *Lawton v. Steele*, 119 N. Y. 226, 16 Am. St. Rep. 818;

Fertilizing Co. v. Hyde Park, 97 U. S. 659, 667. The maintenance of a nuisance may be made a crime: *State v. Gould*, 40 Iowa, 372; *Mugler v. Kansas*, 123 U. S. 623; and a subject of indictment: *South Carolina R. R. Co. v. Moore*, 28 Ga. 398, 73 Am. Dec. 778; note to *Tate v. Ohio etc. R. R. Co.*, 71 Am. Dec. 311. A legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, but a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed to abate it: *Lawton v. Steele*, 152 U. S. 133, 140; affirming *Lawton v. Steele*, 119 N. Y. 226, 16 Am. St. Rep. 813. It has power to enlarge the category of public nuisances by declaring places or property used to the detriment of public interests, or to the injury of the health, morals, or welfare of the community, to be nuisances, although not such at common law. It may authorize the removal or abatement of a public nuisance by executive officers, and such destruction of the property used in maintaining such nuisances as may be requisite for such abatement; but it cannot decree the destruction of property so used as a punishment of wrong, nor even to prevent the further illegal use of it, where the property is not a nuisance per se. The destruction of fishing nets, which are by law declared to be public nuisances, may, however, be authorized on the ground that such destruction is not as a punishment of wrong, but is a reasonable incident of the power to abate the nuisance: *Lawton v. Steele*, 119 N. Y. 226, 16 Am. St. Rep. 813; affirmed in *Lawton v. Steele*, 152 U. S. 133. Compare the subdivisions, Fish and Game, and Intoxicating Liquors, *supra*.

Oleomargarine or Imitation Butter.—The prohibition of the manufacture out of oleaginous substances, or out of any compound thereof other than that produced from unadulterated milk or cream from unadulterated milk, of an article designed to take the place of butter or cheese produced from pure unadulterated milk or cream from unadulterated milk, or the prohibition upon the manufacture of any imitation or adulterated butter or cheese, or upon the selling or offering for sale, or having in possession with intent to sell the same as an article of food, is a lawful exercise by the state of the power to protect, by police regulations, the public health; and the legislature, therefore, has power, without offending any constitutional rights to make the violation of such prohibitions a crime: *Powell v. Pennsylvania*, 127 U. S. 678, 683; *Commonwealth v. Huntley*, 156 Mass. 236; *State v. Horgan*, 55 Minn. 183; *McAllister v. State*, 72 Md. 390; *State v. Newton*, 50 N. J. L. 534; *People v. Arensberg*, 105 N. Y. 123, 59 Am. Rep. 483; *Cook v. State*, 110 Ala. 40; *State v. Marshall*, 64 N. H. 549; *Fox v. State*, 89 Md. 381, 73 Am. St. Rep. 193; *Commonwealth v. Schollenberger*, 156 Pa. St. 201, 36 Am. St. Rep. 32; *State v. Bockstruck*, 136 Mo. 335; *Butler v. Chambers*, 36 Minn. 69, 1 Am. St. Rep. 638, and ex-

tended note thereto on the power of the state to regulate or prohibit the sale or manufacture of articles. And sales of impure oleomargarine may be prohibited and made criminal, though such article has been imported from another state: *Commonwealth v. Huntley*, 156 Mass. 236; *Fox v. State*, 89 Md. 381, 73 Am. St. Rep. 193. So a statute prohibiting and making criminal the sale of oleomargarine unless it has been colored pink is constitutional: *State v. Myers*, 42 W. Va. 822, 57 Am. St. Rep. 887; *Armour Packing Co. v. Snyder*, 84 Fed. Rep. 136; *State v. Marshall*, 64 N. H. 549. But see *Collins v. New Hampshire*, 171 U. S. 30, cited, *supra*, in the subdivision, Interstate Commerce. Congress did not intend, by the act of August 2, 1886 (24 Stats., c. 840, p. 209), imposing certain special taxes upon manufactures of the article defined as oleomargarine, to interfere with the exercise, by the states, of any authority they could rightfully exercise over the sale of that article within their respective limits. Nor was the act intended as a regulation of commerce among the states. It left the states free to exercise any authority they possess of preventing deception or fraud in sales of the property within their respective limits: *Plumley v. Massachusetts*, 155 U. S. 461, 466, 467; and a wholesale dealer in such article who fails to comply with a regulation made by the commissioner of internal revenue, with the approval of the secretary of the treasury, under section 20 of that act, requiring him to keep a book, and make a monthly return, showing certain prescribed matters, is not liable to the penalty imposed by section 18 of the act, because he does not omit or fail to do a thing required by law in the carrying on or conducting of his business. A sufficient statutory authority must exist for declaring any act or omission a criminal offense, as there are no common-law offenses against the United States: *United States v. Eaton*, 144 U. S. 677.

A statute which prohibits and makes criminal the manufacture or sale, for food, of any substitute for butter or cheese produced from pure unadulterated cream or milk is unconstitutional: *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34. And under a statute prohibiting the manufacture or sale of any article not produced from milk or cream, "in imitation or semblance of, or designed to take the place of, butter," it is not criminal to sell a substitute for butter unless it is in imitation or semblance thereof: *People v. Arensberg*, 103 N. Y. 388, 57 Am. Rep. 741. See the subdivisions, Dairy Products, and Interstate Commerce, *supra*, and Pure Food Laws, *infra*.

Opium.—The selling or giving away of opium may be made a crime by statute, and such an act is constitutional: *State v. Ah Chew*, 16 Nev. 50, 40 Am. Rep. 488; *Ex parte Yung Jon*, 28 Fed. Rep. 308. The same is true of maintaining a place for smoking opium: *State v. Lee*, 137 Mo. 143. See the subdivision, *infra*, Possession of Certain Things.

Options.—All “option” purchases and sales, and contracts therefor, “of the shares of stocks or bonds of any corporation, or petroleum, provisions, cotton, grain, or agricultural products,” may be declared gambling and criminal offenses where there is no intention of receiving and paying for the property bought, or of delivering the property sold, without depriving any person of life, liberty, or property without due process of law, and without violating any inhibition against special laws: *State v. Gritzner*, 134 Mo. 512. See the principal case.

Persuading Seamen to Desert.—A legislature may, without violating the federal constitution, make it an offense to persuade, or attempt to persuade, any seaman to leave any vessel within the jurisdiction of the state, the rule being “that the statute of a state and an act of Congress may each prohibit the commission of the same offense, and prescribe the same or a different punishment therefor, under which the party found guilty thereof may suffer the penalties provided by the laws of the United States and of the state”: *Ex parte Young*, 36 Or. 247, 250, post, p. 772.

Physicians, Surgeons, Dentists, and Midwives.—The legislature has power to make it criminal for a person to practice medicine or surgery without an examination and license from the proper authority: *Dent v. West Virginia*, 129 U. S. 114; affirming *State v. Dent*, 25 W. Va. 1; *State v. Call*, 121 N. C. 643; *State v. Van Doran*, 109 N. C. 664; *Eastman v. State*, 109 Ind. 278, 58 Am. Rep. 400; *People v. Phippin*, 70 Mich. 6. So with the practice of dentistry: *Wilkins v. State*, 113 Ind. 514. A statute requiring physicians and midwives to report births and deaths to the clerks of courts is not unconstitutional nor unreasonable: *Robinson v. Hamilton*, 60 Iowa, 134, 46 Am. Rep. 63.

Plumbers.—It may be made a crime for a person to engage in the business of plumbing without having passed an examination as to his competency and qualifications, but such legislation, to be valid, must operate equally upon all engaged in such business. Hence a statute requiring all who engage in the business of plumbing, whether master or employing plumber or journeyman, to first pass an examination as to fitness and procure a license, but providing that in case of a firm or corporation the examination and licensing of any one member of such firm, or the manager of the corporation, shall satisfy the requirements of the act, thus permitting all members of a firm or corporation to pursue the business when only one member or the manager has procured such license, is unconstitutional and void, as not operating equally upon all of a class pursuing the same business under similar circumstances: *State v. Gardner*, 58 Ohio St. 599, 65 Am. St. Rep. 785.

Possession of Certain Things.—The legislature may make it criminal for a person to have in his possession any opium, morphine, cocaine, or drugs of a like nature, unless procured on the prescription of a regularly licensed physician prescribing for the cure of disease.

The mere possession of one of the prohibited drugs may be made criminal, though it is not kept for gift or sale: *Ex parte Mon Luck*, 29 Or. 221, 54 Am. St. Rep. 804. It may also be made an offense for any person to knowingly have in his possession and secretly keep any plate for the purpose of striking or printing any false or counterfeit bank notes. "No man can secretly and knowingly keep any plate, engraved for the purpose of counterfeiting, and be innocent": *Sasser v. State*, 13 Ohio, 453, 484. But a common carrier who knows that closed packages delivered to him for transportation contain lobsters, but does not know, nor have reason to believe, that they are of a kind which he is prohibited by law from having in his possession, does not, by retaining such possession for the purpose of transportation without examination, render himself liable for a penalty imposed by statute. The carrier is not compelled to break open the packages to determine whether they contain goods which he is prohibited, under penalty, from having in his possession: *State v. Swett*, 87 Me. 99, 47 Am. St. Rep. 306. See the subdivision, Fish and Game, *supra*.

Press, Liberty of.—A constitutional provision that "no law shall ever be passed to restrain the liberty of speech or of the press" does not authorize acts of licentiousness, or any act inconsistent with the peace or safety of the state; and it is, therefore, within the legislative power to prohibit and make criminal the publication of a "book, magazine, pamphlet, or paper, devoted to the publication, or principally made up, of criminal news, police reports, or pictures and stories of deeds of bloodshed, lust, or crime," whether such publication would, or would not, be sufficient to support an indictment at common law for nuisance or libel, for the legislature has the power to declare that such a publication endangers the public morals: *State v. McKee*, Conn., May, 1900. A statute may, without violating the constitutional guaranty of freedom of speech or the liberty of the press, make it a felony for one to engage in editing, publishing, or disseminating a paper devoted mainly to the publication "of scandals, whorings, lechery, assignations, intrigues between men and women, and immoral conduct of persons": *State v. Van Wye*, 136 Mo. 227, 58 Am. St. Rep. 627; *In re Banks*, 56 Kan. 242. A contemptuous report of the proceedings of a court may be made a misdemeanor, and without depriving the court of its power to punish such act as a contempt: *State v. Faulds*, 17 Mont. 140. But in Texas a municipal corporation is not invested with the power to declare the sale of newspapers a public nuisance: *Ex parte Neill*, 32 Tex. Cr. Rep. 275, 40 Am. St. Rep. 776.

Prison-made Goods.—A failure to brand goods as prison made cannot be lawfully declared a crime. Thus, a statute requiring all articles made by prison labor, or in any establishment in which convict labor is employed, to be branded, labeled, or marked before being sold or exposed for sale, so as to show that they are convict made, is unconstitutional as an inexcusable and intolerable

invasion of the rights and liberty of the citizen; and such a statute, if sought to be applied to goods manufactured in another state, is void as an attempted regulation of interstate commerce: *People v. Hawkins*, 157 N. Y. 1, 68 Am. St. Rep. 736. See the subdivision, Interstate Commerce, *supra*.

Profanity.—The legislature may make it unlawful to use profane language in certain localities. It is a police regulation and not obnoxious to the constitution on the ground that it is not uniform and in effect over the entire state: *State v. Warren*, 113 N. C. 683; and, to constitute profanity, it is not necessary that the name of the Deity should be used: *State v. Wiley*, 76 Miss. 282, 71 Am. St. Rep. 531.

Prostitution.—The placing, leaving, or keeping of a married woman in a house of prostitution may be made a crime, and a statute which purports to punish the connivance, consent, or permission of the husband to the placing or leaving of his wife in such a place, or allowing or permitting her to remain therein, does not deprive him of his liberty without due process of law: *People v. Bosquet*, 116 Cal. 75. A municipal corporation has no power to enact an ordinance punishing as a crime the mere presence in or return to the corporate limits of a public prostitute, although the statute authorizes such corporation to pass ordinances to punish persons for lewd and lascivious behavior in the streets or other public places, and to suppress bawdy and assignation houses, and indecent and disorderly conduct: *Paralee v. Camden*, 49 Ark. 165, 4 Am. St. Rep. 35.

Pure Food Laws.—In the exercise of its police power, a legislature may protect the public health by making it a crime to sell adulterated food, drink, or drugs, irrespective of the seller's knowledge of the adulteration: *People v. Snowberger*, 113 Mich. 86, 67 Am. St. Rep. 449; *Betts v. Armstead*, L. R. 20 Q. B. Div. 771; *Pain v. Boughtwood*, L. R., 24 Q. B. Div. 353. No man has a constitutional right to keep secret the composition of substances sold by him to the public as articles of food. Therefore, a statute requiring the seller of "lard substitutes" to give notice of that fact to the purchaser, by labeling the article with a quantitative analysis of its ingredients, and making an omission or refusal to do so a criminal offense, does not deprive the seller of his property without due process of law, but is a valid exercise of the police power: *State v. Aslesen*, 50 Minn. 5, 36 Am. St. Rep. 620; see, also, *State v. Capital etc. Dairy Co.*, 62 Ohio St. 123, as to other articles of food. Under the police power of the state, the legislature may legally pass an act stating in distinct terms, as to any article of food or drink, that, if any person shall adulterate such article, naming it, with any other substance, without labeling it, he shall be guilty of an offense; but it is not competent to make criminal the mixing or mingling of articles of food which are wholesome and nutritious and absolutely prohibit the sale thereof. A statute providing that,

if certain named wholesome and nutritious articles of food are mixed or intermingled, the product must be labeled, showing the component elements thereof, and punishing a failure to so label, is valid, but a statute which embraces all articles of food or drink, without naming any, and makes the mixture of any articles of food, however nutritious, without labeling the product, an offense, is too general in its terms, and cannot be enforced: *Dorsey v. State*, 38 Tex. Cr. Rep. 527, 70 Am. St. Rep. 762. It may be made a criminal offense to sell baking-powder containing alum without a label giving such notice: *Stolz v. Thompson*, 44 Minn. 271, 272; or to sell vinegar containing any preparation injurious to health, or which contains any artificial coloring matter: *People v. Girard*, 145 N. Y. 105, 45 Am. St. Rep. 595. Compare the subdivisions, Dairy Products, and Oleomargarine, *supra*.

Quarantine Regulations.—It is within the power of the legislature to make it unlawful for any person to refuse to permit his baggage and personal effects to be disinfected in accordance with rules and regulations formulated by the state board of health, and to declare a willful violation of such rules and regulations a misdemeanor: *Hurst v. Warner*, 102 Mich. 238, 47 Am. St. Rep. 525. Compare the monographic note to this case on quarantine and health laws and regulations.

Railway Affairs.—The stopping of a railway train with intent to rob may be made a crime: *State v. Stubblefield*, Mo., June, 1900; and it may be made criminal for railway employes to burn, mutilate, haul off, or bury stock killed by trains: *Bannon v. State*, 49 Ark. 167. A statute may make it an offense for a railway company to make unreasonable charges for the transportation of passengers or freight, or to make unjust discrimination: *Chicago etc. R. R. Co. v. Jones*, 149 Ill. 361, 41 Am. St. Rep. 278. But the Kentucky statute which made it an offense for a railroad corporation to charge more than a "just and reasonable rate" was held, in *Louisville etc. R. R. Co. v. Commonwealth*, 99 Ky. 132, 59 Am. St. Rep. 457, to be void for uncertainty, as it failed to prescribe or fix what should constitute such a rate; and a subsequent act of that state, supposed to attempt to supply what this decision held to be lacking, was declared invalid in *Louisville etc. Ry. Co. v. McChord*, 103 Fed. Rep. 216, holding, among other things, that a railroad commission cannot subject a railway company to criminal prosecution and heavy punishment for charging the rates authorized by its charter. A statute requiring railway companies to issue mileage books under a penalty for refusal to do so is unconstitutional as to corporations existing at the time of its enactment: *Beardsley v. New York etc. R. R. Co.*, 162 N. Y. 230. See the subdivision, Ticket Brokerage, *infra*.

Refusal to Cash Checks or Scrip.—A statute declaring that any persons, firms, or corporations refusing to cash any check or scrip presented to them within thirty days of its date of issuance shall

be deemed guilty of a misdemeanor is in conflict with the provisions of the constitution prohibiting the legislature from passing any law authorizing imprisonment for debt, and is therefore void: *State v. Paint Rock etc. Coke Co.*, 92 Tenn. 81, 36 Am. St. Rep. 68.

Right to Keep and Bear Arms.—It is provided by the second amendment to the constitution of the United States that, “a well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.” But this does not give the right to bear arms for a lawful purpose, nor is such right dependent upon the federal constitution for its existence. The second amendment means no more than that it shall not be “infringed” by Congress, and has no other effect than to restrict the powers of the national government: *United States v. Cruikshank*, 92 U. S. 542, 553; *Presser v. Illinois*, 116 U. S. 252; *Spies v. Illinois*, 123 U. S. 131. The right, therefore, to keep and bear arms must be searched for in the constitutions and laws of the respective states; and the right of state legislatures to make the carrying of concealed weapons a crime is now generally recognized: *State v. Reid*, 1 Ala. 612, 35 Am. Dec. 44; *Andrews v. State*, 3 Helsk. 165, 8 Am. Rep. 8; *State v. Wilforth*, 74 Mo. 528, 41 Am. Rep. 330; *Fife v. State*, 31 Ark. 455, 25 Am. Rep. 556, and extended note; *Haile v. State*, 38 Ark. 564, 42 Am. Rep. 8; *State v. Wilburn*, 7 Baxt. 57, 32 Am. Rep. 551; *State v. Speller*, 86 N. C. 697; *Walburn v. Territory*, 9 Okla. 23; *State v. Workman*, 35 W. Va. 867; *Willis v. State*, 105 Ga. 633. The powers of government are intended to operate upon the civil conduct of the citizen, and whatever offends against public morals or public decency comes within the range of legislative authority: *English v. State*, 35 Tex. 472, 14 Am. Rep. 374.

It may be made a crime to keep and bear arms in the presence of courts of justice: *Hill v. State*, 53 Ga. 472; but the right to bear arms cannot be cut off altogether: *Nunn v. State*, 1 Ga. 243; and it has been held no crime to wear them openly upon the person: *Stockdale v. State*, 32 Ga. 225. The right of the citizens to bear arms in defense of themselves and of the state cannot be taken away or impaired, according to *Bliss v. Commonwealth*, 2 Litt. 90, 13 Am. Dec. 251. In that case an act to prevent the carrying of concealed weapons was pronounced unconstitutional and void, but since then the constitution of the state has been altered so as to give the legislature power to prevent persons from carrying concealed arms: Note to *Bliss v. Commonwealth*, 13 Am. Dec. 255; *Hopkins v. Commonwealth*, 3 Bush, 480; and one may be found guilty, in Kentucky, of carrying a concealed deadly weapon though he is simply carrying to the purchaser a pistol sold by another: *Cutsinger v. Commonwealth*, 7 Bush, 392. The mode and occasion of wearing war arms may doubtless be regulated to some extent by the legislature, but to make it criminal for a citizen to wear or

carry a war arm except upon his own premises or when on a journey, or when acting as or in aid of an officer, is an unwarranted restriction upon his constitutional right to keep and bear arms: *Wilson v. State*, 33 Ark. 557, 34 Am. Rep. 52.

In Arkansas, it is a crime to sell pistols, except navy pistols, and the statute making it so is constitutional: *Dabbs v. State*, 39 Ark. 353, 43 Am. Rep. 275. It is also a crime in Tennessee to sell, or offer to sell, pistols, except army or navy pistols. A merchant in that state purchased a stock of pistols of several kinds under a license. The privilege was repealed by an act of the legislature after his license had expired but before his stock was exhausted. Offering to sell the balance afterward, it was held that his act was criminal: *State v. Burgoyne*, 7 Lea, 173, 40 Am. Rep. 60.

Removal of Cotton in the Seed may be made a crime, and a statute declaring it to be unlawful, within certain counties, to transport or move, after sunset and before sunrise of the succeeding day, any cotton in the seed, but permitting the owner or producer to remove it from the field to the place of storage, is not unconstitutional: *Davis v. State*, 68 Ala. 58, 44 Am. Rep. 128; *Mangan v. State*, 76 Ala. 60. A statute is also constitutional which declares that it shall be unlawful for any person "to sell, or offer for sale, barter, exchange, or buy," within certain counties and boundaries specified, "any cotton in the seed," or to buy any cotton in the seed raised within such counties: *Mangan v. State*, 76 Ala. 60; or which declares that it shall be unlawful for any person to sell, deliver, or receive, for a price, cotton in the seed, where the quantity is less than what is usually contained in a bale, unless such sale shall be in writing, signed by all the parties thereto, and witnessed by two witnesses, and such writing delivered, with a fee, to the nearest justice of the peace, whose duty it is to docket the same on his civil docket for the inspection of all persons: *State v. Moore*, 104 N. C. 714, 17 Am. St. Rep. 696.

Stealing Merchandise Belonging to a Wrecked Vessel is a crime against the United States: *United States v. Coombs*, 12 Pet. 72, 79.

Suicide was a crime at the common law, but it is not a crime by the laws of the state of New York, though an attempt to commit it is: *Darrow v. Family Fund Soc.*, 116 N. Y. 537, 15 Am. St. Rep. 430.

Sunday Laws are constitutional, and may be supported as regulations of police: *Judefind v. State*, 78 Md. 510; *State v. Hogreiver*, 152 Ind. 652; *State v. Powell*, 58 Ohio St. 324; *Norfolk etc. Ry. Co. v. Commonwealth*, 93 Va. 749, 57 Am. St. Rep. 827; *People v. Bellet*, 99 Mich. 151, 41 Am. St. Rep. 589; *Scales v. State*, 47 Ark. 476, 58 Am. Rep. 768; monographic note to *City Council v. Benjamin*, 49 Am. Dec. 616-623; and the legislature may make it criminal to labor on Sunday: *Judefind v. State*, 78 Md. 510; *Scales v. State*, 47 Ark. 476, 58 Am. Rep. 768; *State v. Petit*, 74 Minn. 376; affirmed in *Petit v. Minnesota*, 177 U. S. 164; or to play baseball, or

exhibit "any baseball playing" on that day where a fee is charged for admittance: *State v. Powell*, 58 Ohio St. 324; *State v. Hogreiver*, 152 Ind. 652; or to sell liquor on that day: *Searcy v. State*, Texas Criminal Appeals, June, 1899; or to keep a saloon open on Sunday: *People v. Roby*, 52 Mich. 577, 50 Am. Rep. 270; or to do business on that day, except works of necessity or charity: *State v. Petit*, 74 Minn. 376; affirmed in *Petit v. Minnesota*, 177 U. S. 164. The police power of the state may be exercised, as a necessary sanitary regulation, to prohibit citizens from engaging in secular pursuits on Sunday, although such pursuits are noiseless and harmless in themselves: *People v. Bellet*, 99 Mich. 151, 41 Am. St. Rep. 589. Hence the legislature may make it criminal for barbers to carry on their business on Sunday: *People v. Bellet*, 99 Mich. 151, 41 Am. St. Rep. 589; *State v. Petit*, 74 Minn. 376; affirmed in *Petit v. Minnesota*, 177 U. S. 164; *Breyer v. State*, 102 Tenn. 103; *People v. Havnor*, 149 N. Y. 195, 52 Am. St. Rep. 707. But it has been held in some other cases that the legislature cannot make it unlawful for barbers to do business on Sunday, without including any other class of business: *Eden v. People*, 161 Ill. 296, 52 Am. St. Rep. 365; *Ex parte Jentzsch*, 112 Cal. 468; or delegate to a municipal corporation the power to declare it to be unlawful for barbers to pursue their business on Sunday: *Tacoma v. Krech*, 15 Wash. 296.

A statute, however, which declares, as a matter of law, that keeping open a barber shop on Sunday, for the purpose of hair cutting and shaving, is not a work of necessity or charity, while, as to other kinds of labor or business, it leaves that question to be determined as one of fact, has been held by high authority not to exceed the limits of legislative police power: *State v. Petit*, 74 Minn. 376; affirmed in *Petit v. Minnesota*, 177 U. S. 164. And a statute making it unlawful for barbers to carry on their business on the first day of the week, known as Sunday, and excepting from its operation such persons engaged in such business as conscientiously believe the seventh day of the week should be observed as Sunday, and actually refrain from secular business on that day, is within the police power of the state, and not unconstitutional as class legislation, nor as depriving any person of life, liberty, or property without due process of law, nor as denying any person the equal protection of the laws: *People v. Bellet*, 99 Mich. 151, 41 Am. St. Rep. 589. It has even been held that a statute which denounces the business of barbering on Sunday as a misdemeanor, and which imposes a heavier penalty for that misdemeanor than is imposed by the general law upon other violations of the Sabbath, is not unconstitutional as vicious class legislation: *Breyer v. State*, 102 Tenn. 103, 107. Nor is the New York statute making it a misdemeanor to carry on the barbering business on Sunday unconstitutional because it makes an exception that, in the city of New York and in the village of Saratoga Springs, such business may be carried on until 1 o'clock of the afternoon of that day: *People v.*

Havnor, 149 N. Y. 195, 52 Am. St. Rep. 707. But an act making it a "misdemeanor for anyone engaged in the business of a barber to shave, shampoo, cut hair, or keep open their bathrooms on Sunday," is void, because it embraces two distinct subjects—barbering and bathing: *Ragio v. State*, 86 Tenn. 272.

It was held in *Norfolk etc. R. R. Co. v. Commonwealth*, 88 Va. 95, 29 Am. St. Rep. 705, that a statute making it criminal for interstate freight trains, with certain exceptions, to run on Sunday was unconstitutional and void as to trains running between different states, because it was a regulation of, or obstruction to, interstate commerce. But it is elsewhere held that a state statute making it a misdemeanor to run freight trains on Sunday is not unconstitutional where it contains nothing in its provisions suggestive of a purpose to interfere with interstate traffic, or indicative of any other intent than to prescribe a rule of civil conduct for people within the state, although it may affect interstate commerce to some extent, so far as running freight trains from one state to another is concerned: *State v. Southern Ry. Co.*, 119 N. C. 814, 56 Am. St. Rep. 689; *Hennington v. Georgia*, 163 U. S. 299; *Norfolk etc. Ry. Co. v. Commonwealth*, 93 Va. 749, 763, 57 Am. St. Rep. 827, 837, stating that *Norfolk etc. R. R. Co. v. Commonwealth*, 88 Va. 95, 29 Am. St. Rep. 705, in which a different conclusion was reached, "was not correctly decided and should be overruled." It is now held that a Virginia statute prohibiting the running, loading, or unloading on Sunday of any trains, cars, or locomotives not used for the transportation of passengers, livestock, the United States mails, or articles of a perishable nature, or for the relief of wrecked or disabled trains, is constitutional, and may be applied as against empty coal cars, used exclusively in carrying articles of interstate commerce: *Norfolk etc. Ry. Co. v. Commonwealth*, 93 Va. 749, 57 Am. St. Rep. 827.

Ticket Brokerage or "Scalping" may be made a criminal offense: *State v. Corbett*, 57 Minn. 354; 4 Int. Com. Rep. 694; *Fry v. State*, 63 Ind. 552, 30 Am. Rep. 238; *Burdick v. People*, 149 Ill. 600, 41 Am. St. Rep. 829; *People v. Warden*, 26 N. Y. App. Div. 228.

Thus, in *State v. Corbett*, 57 Minn. 345, 4 Int. Com. Rep. 694, in speaking of the evils, or supposed evils, which the legislature designed to remedy by "An act to regulate the sale and redemption of transportation tickets of common carriers and to provide punishment for a violation of the same," Mitchell, J., said: "It was commonly asserted and believed (to what extent correctly is not important) that spurious and stolen tickets, and tickets which had expired by limitation, or that were not transferable, were often put on the market to such an extent as to work great frauds upon both the public and the carriers; that frequently those selling such tickets were irresponsible, so that the party defrauded had no redress; that the business of trafficking in such tickets often furnished an inducement to railway employes to steal tickets, or issue spurious

ones, and put them on the market. It was also commonly believed that, in order to evade statutes designed to secure uniformity of rates and to prevent discriminations, some carriers of passengers were in the habit of placing large blocks of their tickets with 'scalpers,' ostensibly not their agents, for sale at cut rates. To remedy these and similar abuses, real or supposed, this statute was passed." The act was held not to be unconstitutional.

The business of a railroad carrier, and incidentally the manner of the sale of its tickets to points within the state, is a proper subject for the exercise of the police power of a state, and may be regulated by legislative action. A statute prohibiting the sale of railroad tickets or parts thereof, except by authorized agents, or by parties who have purchased tickets with a bona fide intention of traveling thereon, is merely a police regulation, and is not unconstitutional: *Burdick v. People*, 149 Ill. 600, 41 Am. St. Rep. 329. It has also been held that a city ordinance of San Francisco which regulates the issuance and delivery of street-car transfers, which requires them to be given within the street-car from which the transfer is made and received only within the car to which it is made, and which makes it criminal for any person, except the conductor or agent of the street-car line, to give, sell, or issue any transfer check or ticket used for passage on any street-car or line, is not unconstitutional, but a valid exercise of the police power expressly granted to the city: *Ex parte Lorenzen*, 128 Cal. 431. A very different view, however, is taken in *People v. Warden*, 157 N. Y. 116, 68 Am. St. Rep. 763, which holds, though by a divided court, that a statute undertaking to make it a crime for a person to sell, or offer for sale, any passage ticket for passage or conveyance upon any vessel or railway train, unless he is an authorized agent of the owners or consignees of such vessel or corporation running such trains, provided that the authorized agent of any transportation company may purchase from the properly authorized agent of any other transportation company a ticket for a passenger, to whom he may sell a ticket to travel from any point on the line for which he is a properly authorized agent, so as to enable such passenger to travel to the place or junction from which his ticket shall read, is unconstitutional and void.

Trading Stamps—Prizes—Gifts, etc.—There is some contrariety of opinion as to whether it can be made a criminal offense for merchants to give, or offer to give, any article as a gift, prize, premium, or reward to a person who purchases some other article from them. Thus, it was thought in *Humes v. Fort Smith*, 93 Fed. Rep. 857, 863, that the legislature has power to prohibit, as detrimental to the community, the business of a dealer in trading stamps, which he sells to certain merchants only in a city, to be given by them to their customers with their purchases, and which are to be redeemed by the seller in "presents" on their being presented by the customers in certain quantities. One who does such

a business in the District of Columbia may be lawfully convicted of having "engaged in the business of a gift enterprise," which is there forbidden: *Lansburgh v. District of Columbia*, 11 App. Cas. (D. C.) 512. But in Rhode Island a statute making it a misdemeanor for a merchant to give trading stamps in connection with the sale of goods was held unconstitutional and void: *State v. Dalton*, R. I., May, 1900.

A statute prohibiting and making it criminal for any person who sells, exchanges, or disposes of any article of food to give, or offer to give, some other article as a gift, prize, premium, or reward to the purchaser is held to infringe upon the liberty of the seller, and to be unconstitutional and void. It cannot, it is said, be sustained as a lawful exercise of the police power of the state: *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465. But in Maryland a scheme by which packages of coffee contain on either end a pasted slip of paper containing the words "one plate," "one plate," "one saucer," and which, when detached by the buyer of a package of coffee and presented to the seller, entitles the former to two plates and a saucer in addition to the coffee, is within the meaning of a statute prohibiting and making criminal "any scheme or device by way of gift enterprises of any kind or character": *Long v. State*, 73 Md. 527, 25 Am. St. Rep. 606.

United States Mails, Criminal Use of.—Congress has made certain uses of the United States mails a criminal offense: See the monographic note to *State v. McCabe*, 58 Am. St. Rep. 595-603. And a person who sends letters or circulars to a debtor threatening to publish him as a bad character among his neighbors, and to advertise a claim against him for sale, is liable to prosecution and conviction, under a state statute making it a misdemeanor for any person to deliver any letter, circular, etc., threatening to do injury to the "credit or reputation" of another. Such a statute is not unconstitutional as depriving creditors of the protection of their property rights, nor as restricting freedom of speech or publication: *State v. McCabe*, 135 Mo. 450, 58 Am. St. Rep. 589.

Trademarks, Defacing—Bottling Act.—A statute for the protection of owners of bottles used in the sale of soda waters and like beverages, making it criminal for anyone to fill any bottle marked by a trademark, or to deface or obliterate such mark, or to sell or otherwise dispose of such bottles, unless purchased from the person whose mark is on the bottle, or sanctioned by his written consent, does not prohibit one who has purchased the beverage in such bottles from reselling it while in the same bottles in which he bought it, nor does the statute unnecessarily destroy or unlawfully decrease the trade in empty bottles. It is not, therefore, unconstitutional: *People v. Cannon*, 139 N. Y. 32, 36 Am. St. Rep. 668. If a person engaged in the manufacture and sale of soda waters delivers them in bottles to a customer, and takes a deposit from him, with the understanding that he may return the bottles and take

back his deposit, or keep the bottles and regard it as payment, as he may elect, such transaction constitutes a sale of the bottles at the election of the customer, and a prosecution against a dealer in second-hand bottles for having such bottles unlawfully in his possession without the consent of such manufacturer cannot be sustained: *People v. Cannon*, 139 N. Y. 32, 36 Am. St. Rep. 668.

Vendors Near Camp-meetings.—A legislature may make it a criminal offense for anyone to establish and maintain a place for vending provisions or refreshments, within a given distance of camp-meetings, without the permission of the proper authorities. Such laws are intended to prevent the disturbance of the assembly, and are constitutional: *Meyers v. Baker*, 120 Ill. 567, 60 Am. Rep. 580; *Commonwealth v. Bearse*, 132 Mass. 542, 42 Am. Rep. 450; *State v. Cate*, 68 N. H. 240; although an exception is made in favor of one who has his regular place of business within such limits: *Meyers v. Baker*, 120 Ill. 567, 60 Am. Rep. 580; *Commonwealth v. Bearse*, 132 Mass. 542, 42 Am. Rep. 450. Compare *Commonwealth v. Bacon*, 13 Bush, 210, 26 Am. Rep. 189.

Miscellaneous Offenses.—A statute which imposes a fine for begetting a bastard child makes the act criminal: *State v. Wynne*, 116 N. C. 981. A legislature may also make it a crime for a man to marry a woman to escape a prosecution for seduction, where he afterward deserts her without good cause: *Morris v. Stout*, Iowa, April, 1899; or for one, having authority to join others in marriage, to willfully fail to make return of any marriage solemnized by him to the recorder of the proper county: *State v. Madden*, 81 Mo. 421; or for a person to carnally know any female child under the age of eighteen years: *State v. Phelps*, Wash., Feb., 1900. Fornication is a crime in the state of Georgia: *Bennett v. State*, 103 Ga. 66, 68 Am. St. Rep. 77. The legislature may, it seems, make it a crime for one to allow "Texas cattle" to run at large: *Kimmish v. Ball*, 129 U. S. 217, 222. It may make it a crime, or, at least, so far as the question has come under our observation, it has not been questioned that a legislature has power to make it criminal for a citizen in Alabama to distill his grain into spirituous or intoxicating liquor, unless employed by the governor to do so: *Ingram v. State*, 39 Ala. 247, 84 Am. Dec. 782; or for people to use bicycles on a particular road, where such use is likely to prove injurious to other persons: *State v. Yopp*, 97 N. C. 477, 2 Am. St. Rep. 305; or for one to falsely make and file a nomination paper: *Commonwealth v. Connelly*, 163 Mass. 539; or for one to sell, keep, or offer for sale, naphtha under any assumed name: *Commonwealth v. Wentworth*, 118 Mass. 441; or for one to obstruct a public drain: *Toops v. State*, 92 Ind. 13; or for a mortgagor to sell mortgaged personal property: *State v. Hurds*, 19 Neb. 316; or for one to deposit sawdust in the waters of a lake or any tributary thereto, thus rendering the waters unwholesome: *State v. Griffin*, 69 N. H. 1, 76 Am. St. Rep. 189. Cruelty to children has been made a crime: *Cowley v. People*,

83 N. Y. 464, 38 Am. Rep. 464; and one may be indicted under the laws of the United States for removing, without destroying, stamps from cases containing distilled spirits: *United States v. Bayaud*, 16 Fed. Rep. 376.

But enactments, to be valid under an exercise of the police power, must have reference to the comfort, the safety, or the welfare of society, and must not be in conflict with the constitution: *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465. Hence a statute making it a misdemeanor to manufacture cigars in cities of more than five hundred thousand inhabitants in any tenement-house occupied by more than three families, except on the first floor of houses on which there is a store for the sale of cigars and tobacco, is unconstitutional, because it is not a health law and has no relation whatever to the public health: *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636. "We are not aware," said the court in this case, "and are not able to learn that tobacco is even injurious to the health of those who deal in it, or are engaged in its production or manufacture. We certainly know enough about it to be sure that its manipulation in one room can produce no harm to the health of the occupants of other rooms in the same house": *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636. It was proved in this case that the odor of the tobacco did not extend to any of the other rooms of the tenement-house. An act, it has been held, cannot be made criminal which the party committing cannot know in advance whether it is criminal or not. Hence the making of an unreasonable charge for services cannot be made criminal under a statute creating no test of reasonableness in this respect: *Louisville etc. R. R. Co. v. Commonwealth*, 99 Ky. 132, 59 Am. St. Rep. 457. But compare the subdivisions, Criminal Intent and Railway Affairs, *supra*. A statute making it a crime to use a likeness of the national flag or emblem for any commercial purposes, or as an advertising medium, is unconstitutional and void as interfering with the personal liberty and privileges of the citizen: *Ruhstrat v. People*, 185 Ill. 133, 76 Am. St. Rep. 30. And no legislative or municipal body has the power to impose the duty of performing an act upon any person which, from his poverty, it is impossible for him to perform, and then make his nonperformance of such duty a crime punishable by fine and imprisonment. Hence a city ordinance which requires all persons owning or occupying any real estate in the city to keep and maintain good and sufficient sidewalks along all streets and avenues in front of or adjacent to such real estate, and imposes a fine or imprisonment for a failure to do so, and a charter provision authorizing such an ordinance, are both unconstitutional and void, because, under such ordinance, a tenant of property, though himself supported by charity, might become guilty of a crime in omitting to construct a sidewalk: *Port Huron v. Jenkinson*, 77 Mich. 414, 18 Am. St. Rep. 409.

Municipal Ordinances.—While violations of municipal ordinances are not usually or properly regarded as crimes, in the sense in which that word is commonly used, which embraces only offenses against the public criminal statutes of the state (*State v. Bonell*, 42 La. Ann. 1110, 21 Am. St. Rep. 413; *Floyd v. Commissioners*, 14 Ga. 354, 58 Am. Dec. 559; *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323, 51 Am. St. Rep. 566), yet, for the purposes of this note, it is necessary to consider them to some extent, and to give some idea of the validity of ordinances which profess to exert the police power. Compare the definition of the word "criminal," in the opening paragraph of this note. A municipal corporation does not, it is true, possess, nor can it exercise, police power, unless it has been delegated thereto by the legislature: *Champer v. Greencastle*, 138 Ind. 339, 46 Am. St. Rep. 390; and a city cannot, unless expressly authorized by statute, make that criminal which the legislature has not seen fit to make so: *State v. Itzcovitch*, 49 La. Ann. 366, 62 Am. St. Rep. 648. But cities may be empowered by the legislature, unless restricted by the constitution, to make local police regulations not in conflict with general laws: *Chicago etc. R. R. Co. v. State*, 47 Neb. 549, 53 Am. St. Rep. 557; *Walker v. Jameson*, 140 Ind. 591, 49 Am. St. Rep. 222; *Stehmeyer v. City Council*, 53 S. C. 259, 282; and municipal ordinances expressly authorized by specific and definite legislative authority are upheld, unless in conflict with the constitution: *Phillips v. Denver*, 19 Colo. 179, 41 Am. St. Rep. 230. An ordinance, however, to be sustainable as an exercise of the police power, must tend, in some degree, toward the prevention of offenses or preservation of the public health, morals, safety, or welfare: *Chicago v. Nechter*, 183 Ill. 104, 75 Am. St. Rep. 93.

If police power has been delegated to a municipal corporation, it may make it criminal for one to keep dogs in violation of the regulations prescribed by ordinance: *Griggs v. Macon*, 103 Ga. 602, 68 Am. St. Rep. 134; *Faribault v. Wilson*, 34 Minn. 256; contra, *Mayor v. Meigs*, 1 McAr. 53, 29 Am. Rep. 578; or for any except licensed persons to conduct the business of collecting, storing, and dealing in old rags, old papers, or other such refuse material within the thickly settled portions of the city: *Commonwealth v. Hubley*, 172 Mass. 58, 70 Am. St. Rep. 242; or for anyone to violate a city ordinance requiring vaccination: *Morris v. Columbus*, 102 Ga. 792, 66 Am. St. Rep. 243; or for anyone to sell impure or adulterated food or milk within the city: *State v. Dupaquier*, 46 La. Ann. 577, 49 Am. St. Rep. 334; or for anyone to smoke in street-cars: *State v. Heldenhain*, 42 La. Ann. 483, 21 Am. St. Rep. 388; or for one to sell cigarettes without a license: *Gundling v. Chicago*, 176 Ill. 340; or for an occupant or owner of property to fail to remove ice, snow, or other obstructions on any sidewalk fronting on or adjacent to such premises where public travel thereon is impeded, obstructed, or rendered dangerous: *Carthage v. Frederick*, 122 N. Y. 268, 19 Am. St. Rep. 490; contra, *State v. Jackman*, 69 N. H. 318; or for anyone

to carry or exhibit a deadly weapon: *Ocean Springs v. Green*, 77 Miss. 472; or for anyone, except an officer or traveler, to carry a concealed weapon without a permit: *Ex parte Cheney*, 90 Cal. 617; or for anyone to sell perishable food commodities in the railroad depots or landings of the city except in the unbroken, imported packages: *State v. Davidson*, 50 La. Ann. 1297, 69 Am. St. Rep. 478; or for one to carry on the business of washing and ironing in public laundries and washhouses within defined territorial limits, from 10 o'clock at night to 6 in the morning: *Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, 113 U. S. 703; or for one to be disorderly, indecent, or insulting: *Grand Rapids v. Williams*, 112 Mich. 247, 67 Am. St. Rep. 396; or for one to permit his inclosure, place, or house to be used as a place for gaming with cards for money or other stake: *City Council v. Kemmis*, S. C., Aug., 1900; or for one to hawk and peddle about the streets of a city articles usually sold in markets, contrary to an ordinance prohibiting it: *Shelton v. Mayor*, 30 Ala. 540, 68 Am. Dec. 143; or for any prostitute to be on the streets of the city between 7 o'clock P. M. and 4 o'clock A. M., except in instances of reasonable necessity: *Dunn v. Commonwealth*, Ky., March, 1899. A city invested with the right to exercise power may also assign limits for houses of prostitution by prohibiting, under prescribed penalties, the location of such houses beyond the designated limits: *L'Hote v. New Orleans*, 51 La. Ann. 93; affirmed in the same case, 177 U. S. 587.

A legislature has constitutional authority to confer on a city the power to enact an ordinance to punish as an offense against the city an act constituting a crime against the state: *Ocean Springs v. Green*, 77 Miss. 472; and an ordinance adopted by a municipal corporation pursuant to authority expressly delegated to it by the legislature has the same force within the corporate limits as a statute passed by the legislature itself: *Carthage v. Frederick*, 122 N. Y. 268, 19 Am. St. Rep. 490.

It is not, however, a criminal offense to disregard an ordinance, such as one relating to houses of ill-fame, enacted without authority: *State v. Webber*, 107 N. C. 962, 22 Am. St. Rep. 920; or which is unreasonable, or not in harmony with the laws of the state on that subject: *In re Ah You*, 88 Cal. 99, 22 Am. St. Rep. 280. Thus, a penal ordinance absolutely forbidding any prostitute or lewd woman to reside in, stay at or in, or inhabit any room, house, or place in a city, and forbidding the renting of any such premises to such persons, is void: *Milliken v. City Council*, 54 Tex. 888, 38 Am. Rep. 629. An ordinance making it unlawful for a person to have a lottery ticket in his possession, unless that possession is shown to be innocent or for a lawful purpose, is void, because it attempts to impose upon the person accused of the crime the burden of establishing his innocence: *In re Wong Hane*, 108 Cal. 680, 49 Am. St. Rep. 138. A city cannot, under the claim of exercising the police power, declare the sale of fresh pork to be detrimental

to the health of its citizens and make it criminal to sell the same, or to offer it for sale, "between the first day of June and October in each year": *Helena v. Dwyer*, 64 Ark. 424, 62 Am. St. Rep. 206; nor can it make it criminal for one to employ Chinese labor: *Ex parte Kuback*, 85 Cal. 274, 20 Am. St. Rep. 226; or to carry on a laundry where clothes are washed for pay, within the habitable portion of the city: *Stockton Laundry Case*, 26 Fed. Rep. 611; *In re Sam Kee*, 81 Fed. Rep. 680. A city may make it criminal for one to willfully violate his contract with it to furnish it or its inhabitants with water, but it cannot make that a crime which is authorized by its contract: *Crosby v. City Council*, 108 Ala. 498. So an ordinance making it a crime for "anyone knowingly to associate with persons having the reputation of being thieves, burglars, pickpockets, pigeon-droppers, bawds, prostitutes, or gamblers, or any other person for the purpose or with the intent to agree, conspire, combine, or confederate to commit any offense, or to cheat or defraud any person of any money or property," is unconstitutional, as being an invasion of the rights of personal liberty: *Ex parte Smith*, 135 Mo. 223, 58 Am. St. Rep. 576; *St. Louis v. Roche*, 128 Mo. 541. An ordinance prohibiting the sale of adulterated or impure milk within the city, and requiring everyone who sells milk of any kind therein to first procure a license therefor, is void, in so far as it requires a license from all who sell milk, when it is doubtful whether the charter authorizes the licensing of milkmen: *State v. Smith*, 67 Conn. 541, 52 Am. St. Rep. 301. A city is not authorized to require a vestibule to be built on each end of street-cars, during the winter time, to afford protection to motor-men, conductors, and others standing upon the platforms of the cars, and to make a violation of the requirement a criminal offense. It is not a proper exercise of the police power: *Yonkers v. Yonkers R. R. Co.*, 61 N. Y. App. Div. 271. A city cannot make it a crime for an owner of dead animals, instead of a contractor, to remove them, and to dispose thereof in his own way, where no necessity for the exercise of the police power for the public good is shown: *State v. Morris*, 47 La. Ann. 1660. As an exercise of police power, a city charter and ordinances may authorize the impounding of animals running at large in the streets, and the sale of them for expenses without judicial proceedings, even if such animals are exempt from execution, but may not impose a penalty on the owner and make it a charge against the animal on the sale: *Wilcox v. Hemming*, 58 Wis. 144, 46 Am. Rep. 625. A city ordinance fixing a less penalty for an offense than that fixed by statute for the same offense is void: *Taylor v. Owensboro*, 98 Ky. 271, 56 Am. St. Rep. 361; and prohibitive ordinances not criminal, but highly penal in their nature, are invalid, unless free from legal and constitutional objection, and cannot be permitted to prejudice the rights and privileges of the citizen in respect to the use and enjoyment of his private property: *Phillips v. Denver*, 19 Colo. 179, 41 Am. St.

Rep. 230. For a list of valid and invalid ordinances, compare the extended note to *Ward v. Mayor*, 35 Am. Rep. 702, 703. See the subdivisions, Buildings; Burial and Removal of the Dead; Free Speech, Right of; Hawkers or Peddlers; Intoxicating Liquors; Lotteries; Press, Liberty of; Prostitution; Sunday Laws; Ticket Brokerage, and Miscellaneous Offenses, *supra*.

HAMMOND v. SHEPARD.

[186 Illinois, 235.]

WATERS—DEFINITION.—"RELICTION" is the term applied to land made by the recession of the water by which it was previously covered.

WATERS—RELICTION—OWNERSHIP.—If an addition to land, by reliction, takes place suddenly and sensibly, the ownership remains according to former boundaries; but if it is made gradually and imperceptibly, the derelict or dry land belongs to the riparian owner from whose shore or bank the water has receded.

WATERS.—SHORE OWNERS ON MEANDERED LAKES. whether navigable or non-navigable, take title only to the water's edge, as title to the bed of such lakes is in the state.

LIMITATION OF ACTION AGAINST COUNTY.—A county owning land which it may sell and convey without a breach of duty, holds it as an individual, and its title may, therefore, be defeated by possession, and payment of taxes, under color of title, made in good faith, for the period prescribed by the statute of limitations.

WATERS—ACCRETION OR RELICTION—APPORTIONMENT.—To take land by accretion or reliction, a shore owner on a meandered lake must make it appear that the addition to his shore was made by slow and imperceptible processes; and if two or more persons own the shore from which the water has receded, the new land must be apportioned between them according to the extent of their shore line.

WATERS—MEANDERED LAKES—RELICTION—DEPRIVING THE STATE OF TITLE.—No shore owner on a meandered lake can deprive the state of its title to the former bed thereof without establishing, by proof, that the dry land was formed by the water receding from his shore line, whether it took place suddenly or gradually.

EJECTMENT—RECOVERY—TITLE.—A plaintiff in ejectment must recover upon the strength of his own title, and not upon the weakness of his adversary's.

J. M. Hunter and A. F. Wingert, for the appellants.

D. S. Berry, for the appellee.

230 WILKIN, J In an action of ejectment in the circuit court of Carroll county Martin Shepard, appellee, recovered a judgment against appellants for the east half of the northwest

quarter of section 21, township 24 north, range 4 east of the fourth principal meridian, Carroll county, in fee. To reverse that judgment this appeal is prosecuted.

The declaration is of three counts, the first describing and claiming the whole of the east half, etc., and each of the others describing and claiming one of the forty acre tracts of the eighty. The plea was not guilty, and a trial was had before the court without a jury.

Plaintiff sought to establish his title to the premises as a whole by color of title, possession, and payment of taxes for seven years, and also by twenty years' adverse possession to a fraction of three and thirty-nine hundredths acres in the southeast corner of the tract, claiming that he became the owner in fee of the remaining seventy-six and sixty-one hundredths acres as accretions to or relictions from said fraction; also, that at the time his grantor obtained a patent from the government to the fraction, all the remainder of the eighty acre tract was between the meandered line of the fraction and the true water line of the lake on which it bounded, and therefore the whole tract passed by such patent; and further, that ²⁴⁰ he had been in the open, exclusive possession of all of the eighty acre tract for more than twenty years prior to the entry upon the same by the defendants. He also set up title to a small part of the north forty of the tract by deed from one Edwin Doty. The defendants introduced in evidence a patent from the United States to Elhanan Fisher, dated July 10, 1873, to the west fractional half of the northwest quarter of this section, containing forty-four acres, and deraigning title to that fraction from said Fisher. The only theory upon which they could claim title to the land in controversy in this suit would be, that by accretion or reliction it had become added to the fractional forty-four acres. It is clear such a claim could not be maintained upon the proofs in this record, and it is not insisted upon by appellants. Their contention is, that the plaintiff failed to establish title in himself to any part of the land described in his declaration, much less to the whole of it, and therefore the judgment of the trial court is erroneous.

The three and thirty-nine hundredths acres is a part of an island in Sunfish lake, the lake extending over portions of Mt. Carroll and York townships, in Carroll county. This lake at one time covered seven hundred and thirty-eight and seventy hundredths acres in sections 30, 31, and 32, township 24, etc., in Mt. Carroll township, extending about one and a half miles

north and south and one mile east and west, most of it being in section 31. In the year 1839 the island of which the three and thirty-nine hundredths acres is a part (known as Shepard's island) and the lake were meandered by government surveyors and duly platted. The evidence all shows that prior to 1871 the bed of the lake, to substantially the meandered line, was covered with water to a depth of several feet. North of the head of the lake is Plum river, and in the fall of 1871, for some reason not appearing from the evidence, the county caused a ditch to be dug from the lake to this river. This drained most, if not all, of the water of the lake from the lands in controversy, in which condition they remained for several years. The ²⁴¹ditch became filled up, and in 1880 or 1881 the lake had again become filled with water to substantially its former depth. No material change took place until the spring of 1890, when the water began to again disappear, which the plaintiff contends continued until the land in suit became dry.

The law of this state, as repeatedly announced, is, that shore owners on meandered lakes, whether navigable or non-navigable, take title only to the water's edge, the bed of the lake being in the state. It is not claimed that the seventy-six and sixty-one hundredths acres became dry land after the lake filled in 1880 or 1881, until after the year 1890, and as no statute of limitations could run against the state, plaintiff wholly failed to prove a prescriptive title to that part of the tract.

The title to the three and thirty-nine hundredths acres remained in the government of the United States until July 10, 1873, when a patent was issued by it to one Elijah Funk, for the use of Carroll county. Afterward, April 20, 1875, Funk and wife deeded the same to plaintiff, the deed reciting: "It being the same land that I, as drainage commissioner, located for the use of Carroll county." Under this deed plaintiff claims title to the three and thirty-nine hundredths acres by color of title, possession and payment of taxes for the statutory period of seven years. The payment of taxes is not denied, but the defendants insist that the requisite proof of possession is wanting, and especially that the land was held by the county of Carroll as a public trust, and that no limitation could run against it under sections 6 and 7 of the statute of limitations: Starr & Curtis' Annotated Statutes, c. 83, sec. 8. While the proof of plaintiff's possession under the Funk deed is not entirely satisfactory, we are inclined to think it sufficient to justify the court below in finding that fact in his favor. In County

of *Piatt v. Goodell*, 97 Ill. 84, one of the questions being, "Does the statute of limitations run against a county in favor of a party holding color of title for swamp lands acquired in good faith and ²⁴² showing payment of taxes and possession for eight years?" we said "the tax deed was color of title under the limitation act of 1839," holding that such land was not held by the county for any public purpose, and the exception in section 8, *supra*, did not apply; that a county, being the owner of land which it may sell and convey without a breach of duty, holds the same as an individual, and its title "may be defeated by possession and payment of taxes under color of title made in good faith, for a period of seven years, in the same manner as if the land belonged to an individual." The land in question was not held by the county for a public use. It could unquestionably sell it and use the proceeds for any lawful purpose. Whether the sale and conveyance were regularly made or not, the deed from Funk was color of title: *Dickenson v. Breeden*, 30 Ill. 279; *Coleman v. Billings*, 89 Ill. 183; *Hinkley v. Greene*, 52 Ill. 223; *Fagan v. Rosier*, 68 Ill. 84. We think the plaintiff established in himself title to the three and thirty-nine hundredths acres, and to that extent he became a shore owner upon the lake.

Just how this fraction fronted on the lake does not fully appear, but under the foregoing rule of law plaintiff's deed conveyed the land no farther than the water line, giving him certain riparian rights. One of these rights as a shore owner was the right to take title to any land which might be added to his shore by accretion or reliction, and the principal question in this case is, as we view it, Did the plaintiff establish, by evidence upon the trial, that the remainder of the eighty acre tract (that is, the seventy-six and sixty-one hundredths acres) became added to the three and thirty-nine hundredths acres by reliction or accretion? "Reliction" is the term applied to land made by the recession of the water by which it was previously covered: *Warren v. Chambers*, 25 Ark. 120, 4 Am. Rep. 23; *Banks v. Ogden*, 2 Wall. 57. "If the addition takes place suddenly and sensibly, the ownership remains according to former boundaries; but if it is made gradually and imperceptibly the derelict or dry land belongs to the riparian ²⁴³ owner from whose shore or bank the water has receded": *Woolrich on Law of Waters*, 29; *Warren v. Chambers*, 25 Ark. 120, 4 Am. Rep. 23. All the authorities agree that in order that a shore owner take land by way of accretion or reliction it must appear that the

addition was to his shore either by the deposit of earth or by the receding of the water from his land, and that such addition must be by slow and imperceptible processes. If two or more own the shore from which the water recedes, the new land must be apportioned between them according to the extent of their shore line.

It is difficult, if not impossible, from the evidence in this case, and the very imperfect plats of the lake and the surrounding land, to correctly understand just what caused the waters to disappear or how the surrounding lands were affected by the drying up of the lake. We are unable, however, in view of the facts presented, to reach the conclusion that the plaintiff established his ownership to the seventy-six and sixty-one hundredths acres as an addition to the three and thirty-nine hundredths acres by reliction. It appears that upon the draining of the lake, in 1871, as the water receded there appeared dry land to the northwest of plaintiff's fraction, which is known in the evidence as Grass island. This island contained some fifteen acres, about one-half of which is situated on the north part of the eighty acres in controversy; also, that some distance north of the three and thirty-nine hundredths acres, and east of Grass island, there appeared a third island. The clear preponderance of testimony is that immediately north of this three and thirty-nine hundredths acre fraction, and between it and the third island, there is a depression, and also that on the east side of Grass island, between it on the one side and the third island and the three and thirty-nine hundredths acre fraction on the other, there is a swale, in which there is more or less water. The general tendency of the evidence is to the effect that the water of the lake on this northwest quarter is deeper on the west side of Grass island than on the east, but there is no satisfactory proof as to the direction in which the water receded from the shore as the lake dried up. Certainly, it fails to show ²⁴⁴ that the whole of the seventy-six and sixty-one hundredths acres became dry land by the water receding from the three and thirty-nine hundredths acres. The existence of the islands mentioned, and the intervening swales and depressions, tend to show that the reliction, at least as to a part of said seventy-six and sixty-one hundredths acres, was not from plaintiff's shore. As before stated, one of his claims of title is that a portion of the north forty became dry land by reliction from the shore of Doty, who had conveyed the same to plaintiff. Manifestly, if that claim of title can be main-

tained, plaintiff must fail in his contention that he became the owner of the seventy-six and sixty-one hundredths acres by reliction from his shore, as owner of the three and thirty-nine hundredths acres. Nor is there any proof upon which to base the conclusion that relictions formed upon plaintiff's shore became so connected with the Doty land as to cover the entire eighty acre tract. We think the plaintiff utterly failed to establish his title to the whole of the land in question by reliction, for the reason already stated that he makes no proof whatever that the reliction was from his shore. Upon the contrary, the clear preponderance of the evidence is that at least a part of the dry land became such by the water receding either from the islands in question or from the east shore.

A considerable portion of the argument is devoted to the question whether or not the drying up of the lake was by such slow and imperceptible processes as to entitle shore owners to the dry land by way of accretion or reliction; but we do not regard that question as of controlling importance in the present state of the record, because, whether the recession of the water was sudden, within the meaning of the law, or gradual, no shore owner can take away from the state its title to the former bed of the lake unless he can establish by proof that the dry land was formed by the water receding from his shore line.

Appellee having wholly failed to show a *prima facie* title in himself to the seventy-six and sixty-one hundredths acres, he is in no position to urge that appellants were mere trespassers and insist ²⁴⁵ that they cannot set up an outstanding title to defeat his action of ejectment. There is nothing in the facts of the case to take it out of the general rule that a plaintiff in the action of ejectment can recover only upon the strength of his own title and never upon the mere weakness of his adversary's.

The judgment of the circuit court will be reversed and the cause remanded for further proceedings consistent with this opinion.

DERELICTION OR RELICTION IS LAND added to a front tract by the permanent uncovering of the waters, the laying bare of the bottom by the retirement of the waters, as contradistinguished from the building up of the bottom by deposits, causing the waters to recede: *Sapp v. Frazier*, 51 La. Ann. 1718, 72 Am. St. Rep. 493.

RELICTION—EFFECT OF—OWNERSHIP.—Title to land made by reliction will vest in the adjacent proprietor if the withdrawal of the waters was slow, gradual, and imperceptive: *Notes to Sapp*

v. Frazier, 72 Am. St. Rep. 501; Cox v. Arnold, 50 Am. St. Rep. 453. If a large body of land is suddenly and perceptibly formed by the reliction of a meandered lake, it belongs to the state: Fuller v. Shedd, 161 Ill. 462, 52 Am. St. Rep. 380.

THE WATERS OF MEANDERED LAKES and the land under them are held by the state in trust for the people: Note to Pewaukee v. Savoy, 103 Wis. 271, 74 Am. St. Rep. 859. A grant of land bounded by the meandered lines of a natural lake conveys only to the water's edge: Fuller v. Shedd, 161 Ill. 462, 52 Am. St. Rep. 380; Noyes v. Collins, 92 Iowa, 566, 54 Am. St. Rep. 571.

THE STATUTE OF LIMITATIONS APPLIES TO MUNICIPAL CORPORATIONS and to the state in like manner as to individuals in similar cases, but it does not apply to the sovereign rights and property of the people of the state, dedicated to the public use: Ralston v. Weston, 46 W. Va. 544, 76 Am. St. Rep. 834; monographic note to Schneider v. Hutchinson, 76 Am. St. Rep. 479-486.

ALLUVION SHOULD BE DIVIDED between riparian proprietors in proportion to the extent of their respective lines on the old frontage: Newell v. Leathers, 50 La. Ann. 162, 69 Am. St. Rep. 395.

A PLAINTIFF IN EJECTMENT MUST RECOVER upon the strength of his own title, and not upon the weakness of his adversary's: Cox v. Arnold, 129 Mo. 337, 50 Am. St. Rep. 450.

EBNER v. MACKEY.

[188 Illinois, 297.]

APPEAL—RULINGS AS TO EVIDENCE, WITHOUT EXCEPTIONS—REVIEW.—The correctness of rulings of the trial court, upon matters of evidence, cannot be reviewed on appeal where no exceptions to them have been preserved.

PHYSICIANS—EVIDENCE—NECESSITY FOR VISITS.—A physician called to treat a patient must determine how often his visits should be made, and so long as the patient accepts his services, and does not discharge him, or require him to come less frequently, or fix the times when he wishes him to attend, he cannot be heard to say that the physician came oftener than was necessary. Hence, in an action for his services, the physician is not required to prove the necessity of making the number of visits he did.

Claim by the appellee, Mackey, a physician, against the estate of Andrew Ebner, deceased, for medical services rendered Ebner and his wife. The claimant obtained a judgment, and the administratrix appealed to the appellate court, which affirmed the judgment and granted a certificate of importance.

Connell & Thomason, for the appellant.

George A. Cooke and James M. Brock, for the appellee.

298 PER CURIAM. In deciding this case, the appellate court delivered the following opinion:

"Complaint is made of the rulings of the trial court in the admission and rejection of testimony. No exception was preserved to any of these rulings, and their correctness is, therefore, not presented to us for decision.

"On the motion of defendant for a new trial, it was assigned as a ground for granting a new trial that the verdict was contrary to the law and the evidence. No reason is shown why the verdict is contrary to law. There was much conflicting evidence as to whether all the services charged for were rendered, and as to whether the services rendered had not been settled for by Ebner in his lifetime. The jury determined these questions for claimant, and there was evidence to support the verdict. The books of claimant were in evidence, showing charges from day to day and time to time during a period of several years, in which time it is conceded claimant did often attend upon the parties professionally, and especially upon Mrs. Ebner. One witness for defendant gave certain dates in the summer of 1897 between which, she testified, Ebner and wife were in Colfax, Iowa. During this period claimant's books contained several charges against deceased, and it is argued that the jury should, in any event, have disallowed those charges. The jury saw this witness and heard her testimony. She was contradicted by the daily entries in the claimant's books. There was a shorter period the same summer, during which the books contained no charges against deceased. Some doubt was thrown upon the correctness of the dates given by the witness by the testimony of another witness for defendant, who at two different times lived in the Ebner family, but did not live there during the summer of 1897, and yet remembered the fact of Mr. and Mrs. Ebner going to Colfax. The jury evidently concluded the witness was mistaken either as to the date or length of the stay at Colfax. We are unable to say ²⁹⁹ they were wrong, or that another jury would reach a different conclusion upon the same evidence.

"The court gave the following instruction for claimant: 'The jury are instructed, as a matter of law, that the physician attending a patient is the proper and sole judge of the necessary frequency of the visits to his patient so long as the patient is in his charge, and in an action for his services the physician is not required, under the law, to prove the necessity of his making the number of visits that he makes and for which he is seeking compensation.'

"Upon this subject, Wood on Master and Servant, section 177, says: 'A physician is to be deemed the proper judge of the necessity of frequent visits to his patient, and the court will presume that all the professional visits made by him were necessary. Hence, in an action for his services, he is not called upon to prove the necessity of making the number of visits he did. The physician being responsible for the want of care and faithful attention to his patients, a contrary rule would work great hardship to him and subject him to undue perils.' To the same effect is *Todd v. Myres*, 40 Cal. 357. *Chicago etc. R. R. Co. v. George*, 19 Ill. 510, 71 Am. Dec. 239, does not, as supposed, announce a contrary doctrine. There, a person injured in a railroad collision brought suit for damages, and sought to recover, among other things, his medical attendance. Of course, he could not recover against the railroad company for all medical attendance he had chosen to have, but only for such as was necessary in curing his injuries. But where a physician is called by a party to treat him or his wife, and he takes charge of the case and attends from day to day, evidently, in view of his responsibility for skillful and proper treatment, he must, in the first instance, determine how often he ought to visit the patient, and, so long as the party employing him accepts his services and does not discharge him, or require him to come less frequently, or fix the times when he wishes him to attend, he cannot afterward ⁸⁰⁰ be heard to say the physician came oftener than was necessary. There was no proof that claimant came when he was forbidden to come, or that he was discharged and continued to attend thereafter. Deceased and his wife called claimant and accepted his services without question. Under the circumstances of this case the instruction was proper.

"Some expressions in other instructions given for the claimant may have been slightly inaccurate, but they were substantially correct. The jury were fully instructed for defendant. The instructions asked by defendant and refused, so far as not embraced in given instructions, were either erroneous or so involved or confusing as to warrant their refusal.

"We find in the record no reversible error. The judgment is therefore affirmed."

We concur in the foregoing views and in the conclusion above announced. Accordingly, the judgment of the appellate court is affirmed.

APPEAL.—NO OBJECTION CAN BE CONSIDERED ON APPEAL, unless it was taken upon the trial and saved by an exception: *Robertson v. Blair*, 56 S. C. 96, 76 Am. St. Rep. 543.

PHYSICIANS—ACTION FOR SERVICES.—A physician called in generally, without limitation as to his attendance, is impliedly engaged to attend the patient through that illness, or until his services are dispensed with: *Dale v. Donaldson Lumber Co.*, 48 Ark. 188, 8 Am. St. Rep. 224.

FREDERICK v. EMIG.

[186 Illinois, 819.]

DOWER — PURCHASE MONEY MORTGAGE — WIFE'S FAILURE TO JOIN IN—EFFECT OF.—Under the statute of Illinois a wife who fails to join in a purchase money mortgage is not entitled to dower as against the mortgagee or those claiming under him, but is entitled to dower as against all other persons.

DOWER — RELEASE OR BAR — JOINDER IN DEED FRAUDULENT AS TO CREDITORS.—A wife's joinder in her husband's deed for the purpose of releasing her dower, which deed is set aside during his lifetime as a fraud upon his creditors, does not release or bar her right to dower, but she may assert it after his death, if not otherwise barred.

DOWER—RELEASE OR BAR—CLAIM OF FEE, UNDER FRAUDULENT DEEDS.—A wife's claim to the fee of land transferred by her husband to her through his brother, in fraud of the husband's creditors, which deed was set aside for that reason during the husband's lifetime, does not affect her right to dower, which was, at the time of such transfer, a mere expectancy.

DOWER—REDEMPTION—RES JUDICATA.—If land has been sold for the benefit of creditors, and a controversy arises between the purchaser and the owner's wife, who claims the fee as assignee of a certificate of purchase on foreclosure, the purchaser's contention, if it prevails, that the wife's transaction was merely a redemption, is, as against him, *res judicata* in a subsequent proceeding by her for dower in the property.

DOWER—WHEN RIGHT TO, DOES NOT EXTEND TO ENTIRE PREMISES.—If a husband's land, sold under a purchase money mortgage, in which his wife did not join, is redeemed by her, but is afterward sold for the benefit of his creditors, she cannot have dower in that part of the land representing the amount of the encumbrance, especially where she has been reimbursed from a part of the proceeds of the latter sale. She must contribute ratably to the amount of the encumbrance, which was superior to her dower, or have dower only in the remainder.

William Winkelman and M. P. Murray, for the plaintiff in error.

Van Hoorebeke & Loudon, for the defendants in error.

320 **CARTWRIGHT, J.** Upon a hearing of the petition of plaintiff in error for dower in two hundred and sixty acres of

land in Clinton county the circuit court dismissed the petition. The facts were not contested, and the question presented on this review is whether the conceded facts entitle plaintiff in error to dower.

Petitioner was married to John Frederick, and he bought the land February 15, 1864, from Alvah Lewis, giving Lewis a mortgage, in which petitioner did not join, for four thousand one hundred dollars, the unpaid part of the purchase money. On August 9, 1865, petitioner joined with her husband in a conveyance of the land to his brother, Nicholas Frederick, releasing her dower therein, and Nicholas Frederick on the same day conveyed the land to petitioner. At the May term, 1869, of the circuit court of Clinton county, the mortgage was foreclosed by scire facias at the suit of Lewis, for the use of William Nichols, and the premises were sold October 9, 1869, by the sheriff, under special execution, to Nichols for four thousand two hundred and forty-four dollars and sixty-two cents, the amount due on the mortgage, and for costs. The premises were not redeemed by petitioner or her husband during the year allowed to them for redemption. Afterward, Nichols consented to a redemption, although the time had expired, because the application was made by a woman, and on November 9, 1870, petitioner and her husband executed a trust deed on the premises and borrowed money with which the amount due Nichols was paid November 11, 1870. He wrote his name on the back of the certificate and delivered it to a broker acting for petitioner. An assignment was filled up over the signature in favor of Adam and Peter Karr, who furnished to petitioner the money with which the redemption was made, and they held the certificate as further security for the loan with the trust deed. On October 25, 1872, petitioner's husband, John Frederick, was adjudged a bankrupt, on his own ³²¹ petition by the district court of the United States for the southern district of Illinois, and his estate, both real and personal, was assigned to John Swaggard, his assignee. In 1874, G. W. Remick, a creditor of the bankrupt husband, filed a bill in said district court of the United States to set aside the conveyances of the land made August 9, 1865, to Nicholas Frederick, and from him to petitioner, on the ground that they were fraudulent and void as against creditors. The bankrupt and petitioner were made defendants, and on April 6, 1874, a decree was entered setting aside the deeds and declaring the lands to be assets of the husband's estate. Afterward, said district court ordered the as-

signee to sell the lands for the benefit of the creditors. On June 4, 1874, Adam and Peter Karr obtained a deed from the sheriff on the certificate of purchase. On June 13, 1874, the assignee sold the lands under an order of the district court to defendant in error Adam Emig for thirteen thousand five hundred dollars, their full value. On June 18, 1874, the Karrs conveyed the premises to petitioner. Emig having been put in possession of the premises under his purchase, petitioner brought suits in ejectment and forcible detainer against him to be restored to possession. Emig then filed his bill in the circuit court of Clinton county to enjoin her from prosecuting her suits, and to have the deeds from the sheriff to the Karrs and from the Karrs to her canceled and declared clouds upon his title. The bankrupt court had made an order to discharge the lien of the purchase money mortgage out of the purchase money paid by Emig, and he claimed that she had redeemed from the mortgage, while she asserted that she had bought the certificate of sale from Nichols, who assigned it to her, and that she held superior title to the land. On November 26, 1875, the circuit court decreed in favor of Emig and set aside the deeds and perpetually enjoined her from prosecuting her suits upon the payment to her of the amount which she had paid to redeem the lands, with interest thereon. ³²² She sued out a writ of error from this court to reverse that decree, but it was affirmed. It was held that the transaction between her and Nichols was a redemption of the land; that the certificate became null and void, and that it could not be used, and was not intended by the parties to be used, as a basis of title: *Frederick v. Emig*, 82 Ill. 363. The money decreed to the petitioner to reimburse her for the amount advanced to make the redemption with interest thereon was received by her. In 1898 her husband died, and she demanded dower in the lands, and filed her petition for the same, which the court dismissed.

The marriage, the seisin of the husband and his death are admitted, and petitioner became entitled to dower in the premises except as against the purchase money mortgage. Section 4 of the dower act is as follows: "Where a husband or wife shall purchase lands during coverture, and shall mortgage such lands to secure the payment of the purchase money thereof, the surviving wife or husband shall not be entitled to dower in such lands, as against the mortgagee or those claiming under him, although she or he shall not have united in such mortgage; but shall be entitled to dower as against all other persons."

She is therefore entitled to dower subject to the purchase money mortgage, unless such dower has been barred or relinquished in legal form, and the question is whether her right has been so barred or relinquished. Her right to dower was not affected by the conveyances of August 9, 1865, in which she joined with her husband in conveying to his brother, who conveyed to her. She was a party to the deed only for the purpose of releasing her dower, and her right to dower could not be separated from the principal estate, so that when the deed became inoperative as against creditors to convey the estate of her husband, it became inoperative to release or bar her right to dower. As against creditors, the deed conveyed ³²³ no estate of the husband, and in such a case a deed is not allowed to operate to release or bar the dower, but the wife may assert it after the death of the husband: *Blain v. Harrison*, 11 Ill. 384; *Summers v. Babb*, 13 Ill. 483; *Stowe v. Steele*, 114 Ill. 382. The assignee, Swaggard, in the bankruptcy proceeding took the estate not only subject to the purchase money mortgage, but also subject to the dower rights of petitioner, as against all other persons than the holder of such mortgage. Emig does not derive title under that mortgage, but holds his title from the assignee in pursuance of the sale of the estate transferred to the assignee. The deeds were set aside at the instance of Remick by virtue of his right as a creditor, and the lands were sold and conveyed for the benefit of creditors, as in *Summers v. Babb*, 13 Ill. 483, and other cases. The same rule applies here, and the dower was not released by the deed. Her attempt to claim the fee through said deeds does not affect her right to dower. The claim of Remick was, that the deed in which she joined to release her dower was void as against him and other creditors, and the establishment of that claim re-established the dower right. She could not set up her dower right in that suit or have it admeasured to her. It was then nothing more than a mere expectancy, and whether it would ever become more was uncertain. She could not have it valued or be compensated for it: *Kauffman v. Peacock*, 115 Ill. 212.

Petitioner afterward attempted to claim the fee through the purchase money mortgage as assignee of the certificate from Nichols, but she was defeated, and the claim of Emig that she had redeemed from the mortgage was sustained by the circuit court, and the decree was affirmed by this court. It is now argued on behalf of Emig that said transaction was not a redemption; that she could not redeem and did not redeem from

the mortgage, and that the payment had no element of redemption, but that question is *res judicata* between the parties. The transaction must be held what it was then adjudged ³²⁴ between the same parties to be. Petitioner's right to dower has not been barred or relinquished.

Petitioner's counsel insist that her right of dower extends to the whole value of the premises, because, they say, the purchase money mortgage to which it was subject was paid by the husband. To this we cannot assent. The purchase money lien was not paid or discharged by the husband, but a portion of the estate in which petitioner claims dower was exhausted to satisfy the lien as against which she had no dower. A portion of the purchase money of the land was devoted to that use, and that part of the land which represented the amount of the encumbrance was paid over to her to reimburse her for her payment to Nichols. She cannot have dower in that part. Although she made the redemption she was fully reimbursed, and must contribute ratably to the amount of that encumbrance, which was superior to her dower, or have dower in the remainder only: 10 Am. & Eng. Ency. of Law, 2d ed., 166.

The decree of the circuit court is reversed and the cause is remanded for further proceedings in accordance with the views herein expressed.

DOWER—ENCUMBERED PREMISES.—A deed of trust is superior to the right of dower when it is given to secure the payment of the purchase price: *Wheatley v. Calhoun*, 12 Leigh, 264, 37 Am. Dec. 654. The foreclosure of a mortgage in which a wife did not join, and sale thereunder, does not bar her right of dower in the mortgaged premises: *Mooney v. Maas*, 22 Iowa, 380, 92 Am. Dec. 395; and see *Miller v. Farmers' Bank*, 49 S. O. 427, 61 Am. St. Rep. 821. A widow is entitled to dower in mortgaged premises as against every person except the mortgagee and those claiming under him, where she made the mortgage with her husband: *McCabe v. Bel-lows*, 7 Gray, 148, 66 Am. Dec. 467.

DOWER—FRAUDULENT DEED BY HUSBAND AND WIFE.—A wife's dower is not barred by the wife's release executed by joining with her husband in a deed which is afterward set aside as fraudulent and void as against creditors: *Bohannon v. Combs*, 97 Mo. 446, 10 Am. St. Rep. 328.

McCoy v. World's Columbian Exposition.

[186 Illinois, 356.]

CORPORATIONS.—A CONTRACT OF SUBSCRIPTION, for the purpose of effecting an incorporation, is binding and enforceable only after the full capital stock has been subscribed.

CORPORATIONS — FULL SUBSCRIPTION — EVIDENCE OF.—THE RECORDS of a corporation are competent and sufficient evidence that the full amount of capital stock has been subscribed. Hence a final certificate of incorporation, with the proceedings attached thereto, is prima facie proof of that fact.

CORPORATIONS — SUIT ON SUBSCRIPTION — UNAUTHORIZED SUBSCRIPTION BY OTHER CORPORATIONS AS A DEFENSE.—The fact that corporations, without authority, subscribed for the capital stock of another corporation, and against which they could make a defense, does not enable an individual subscriber to evade his own subscription, where he, during the whole proceedings to effect the incorporation, made no objection to any subscription by such corporations, or effort to repudiate his own on that account, and where there is no evidence that the contracts of subscription by the corporations were not performed, or that they had availed themselves of their privilege to deny or repudiate their obligations.

CORPORATIONS—SUIT ON SUBSCRIPTION—INCREASE OF STOCK AS A DEFENSE.—It is no defense in a suit upon a subscription for capital stock, made in anticipation of the organization of a corporation, that the capital stock was increased, and that there is no proof that the additional stock was subscribed.

CORPORATIONS—SUIT ON SUBSCRIPTION—EVIDENCE —JUDICIAL NOTICE.—A court will take judicial notice of historical facts of public notoriety, such as the fact that the World's Fair was held in the city of Chicago. Hence in a suit on a subscription to the capital stock of the "World's Columbian Exposition," a corporation, a compliance with the condition that the exposition should be located in that city need not be proved.

CORPORATIONS—INTEREST ON SUBSCRIPTIONS FROM CALL OR DEMAND.—A subscription, in writing, to the capital stock of a corporation, payable in installments, as called for by the directors, matures upon their call or demand, and thereafter draws interest.

Joseph Wright, for the appellant.

Matz, Fisher & Boyden, for the appellee.

357 **CARTWRIGHT, J.** Appellant subscribed for one thousand shares of the capital stock of appellee. The shares were ten dollars each, and at the time of subscription two per cent, or two hundred dollars, was paid to meet preliminary expenses. Afterward, three calls, of eighteen, twenty, and twenty per cent, respectively, of the capital stock were made, which appellant refused to pay. Appellee brought this suit to recover the amount of said calls, and at the trial the court

directed a verdict for seven thousand five hundred dollars, being the amount of the calls, with five per cent interest from the time when they became due. A verdict was returned accordingly, and judgment was entered thereon. The branch appellate court for the first district affirmed the judgment.

To the declaration defendant filed twelve pleas. The first was the general issue, the second nul tiel corporation, and the remaining ten were substantially alike, and averred in different forms that the capital stock of the plaintiff had never been fully subscribed. When the case was called for trial no replications to these pleas had been filed, and defendant objected to a trial and filed his motion for judgment in his favor on each of the twelve pleas. Counsel for plaintiff stated that they would immediately file general replications to each of the pleas, and the court denied the motion for judgment and called a jury. The jurors were sworn to answer questions and examined by the parties, but before they were sworn replications ~~338~~ were presented and leave was given to file them nunc pro tunc as of the time the case was called for trial. The defendant excepted to each ruling of the court, and the jury was sworn to try the issue. It would have been error to try the case without issues of fact being formed on the pleas, and it may be admitted that the court had no power to order the replications filed nunc pro tunc when none had ever been filed and there had been no attempt to file them. The case, however, was not tried without being at issue, and when the jury were sworn to try the issues the latter were fully made up. Defendant suffered no harm, being fully advised as to the issue to be joined when the jurors were examined as to their qualifications. The first two pleas only required the similiter, and the replications were general, alleging that the entire capital stock had been subscribed prior to the calls. When they were filed the jury had not been sworn, and there was opportunity for any further examination, or, if there was good reason, defendant might have asked for time thereafter to prepare for trial, but he did nothing of the kind, and, it is apparent, had no reason to do so. The court was right in denying the motion for judgment and trying the case.

No complaint is made of anything that occurred on the trial up to the time the court directed a verdict, and that direction is attacked solely on the ground that the evidence showed the capital stock had not been fully subscribed at the time the calls were made. Plaintiff was incorporated under the general

act concerning corporations, in force July 1, 1872. The capital stock was fixed at five million dollars, and commissioners were licensed to open books for subscription to such stock. The commissioners took defendant's subscription, with others, for the purpose of effecting the incorporation. In such case, the contract of subscription is binding and enforceable only after the full capital stock has been subscribed. Until the whole amount has been subscribed, the corporation ³⁵⁹ cannot be organized or have a legal existence, and the directors cannot make any call or assessment on the shares. The subscribers cannot be required to pay such assessments until the corporation is authorized by law to begin the prosecution of its business: *Allman v. Havana etc. R. R. Co.*, 88 Ill. 521; *Temple v. Lemon*, 112 Ill. 51; 1 *Redfield on Railways*, 175; *Cook on Stock and Stockholders*, sec. 176; *Morawetz on Private Corporations*, sec. 137. In such a case, after the capital stock has been fully subscribed, the commissioners are authorized to convene a meeting of the subscribers, upon due notice addressed to each, for the purpose of electing directors or managers and for the transaction of other business. In this case the stock was fully subscribed in good faith, and it was not claimed that there was any nominal or fictitious subscription or any release of any subscriber from the obligation of his contract. The notice was given to the subscribers and a meeting held on April 4, 1890, when directors were elected for the term of one year. In pursuance of the statute, on April 8, 1890, the commissioners made a report to the secretary of state of their proceedings, signed and sworn to by them, including therein a copy of the notice to the subscribers of the meeting to organize, a copy of the subscription list and the names of the directors, with their terms of office. The secretary of state thereupon issued a certificate of the complete organization of the corporation, making a part thereof a copy of all the papers filed in his office, including the subscription list, and this was recorded in the office of the recorder of deeds of Cook county, where the principal office of the corporation was located. The records of the corporation are sufficient and competent evidence that the full capital stock has been subscribed: *Cook on Stock and Stockholders*, sec. 180. The final certificate of complete incorporation issued by the secretary of state April 9, 1890, and the proceedings attached thereto, were offered in evidence and ³⁶⁰ were prima facie proof that the full amount of the capital stock had been subscribed: *Jewell v. Rock River Paper Co.*, 101 Ill. 57.

There is no claim that subscriptions to the entire amount of the capital stock were not made and accepted in absolute good faith, but it is contended that the *prima facie* case was overcome by the fact that in the subscription list there appear subscriptions in the names of the Chicago Gas Trust Company and the Nilsson Shirt and Laundry Company, corporations organized under the laws of the state of Illinois, charters of which were introduced in evidence. There were also subscriptions in the names of national banks, and it is said that these, from their names, must necessarily have been banks organized under the national banking law, and that as to all these corporations the act of subscribing to the capital stock of plaintiff was *ultra vires* and the subscriptions not binding. Corporations organized under the laws of this state cannot become stockholders in other corporations unless power is specifically given by their charters or necessarily implied from them (*People v. Chicago Gas Trust Co.*, 130 Ill. 268, 17 Am. St. Rep. 319), and national banks have no power to subscribe for capital stock of other corporations. It was proved that the Nilsson Shirt and Laundry Company had been sued by plaintiff, and a judgment had been recovered against it for its unpaid stock subscription. So far as that corporation is concerned, the judgment established its liability and the validity of its contract. The subscription of the gas trust company or subscriptions of other corporations were illegal in the sense that they were *ultra vires*, and such corporations could make that defense or not, at their pleasure. The contracts may have been performed by the corporations, and there is no evidence that they were not performed.

We are of the opinion that the evidence was not sufficient to discharge defendant from the obligations of his contract. Most cases have arisen under charters granted ³⁶¹ to certain individuals who are constituted a corporation with power to receive subscriptions to the capital stock, but the theory of our general incorporation act is different, in essential particulars, from such cases. Under this act no charter is granted in the first instance, but certain persons are appointed commissioners to receive subscriptions preliminary to organization. They have no other authority than to receive subscriptions and convene the subscribers for the election of directors or managers and the transaction of other business, and to certify the result. When the entire capital stock has been subscribed, the meeting to perfect the preliminary organization is held. The papers and subscription list are then filed in the office of the secretary

of state and a certificate of complete organization is issued. This certificate and papers, including the subscription list, are recorded in the office of the recorder of deeds, and upon such record being made the corporation is deemed fully organized and may proceed to business. During all the proceedings the defendant made no objection to any subscription, but permitted the certificate to be issued and to go upon the public records containing the full list of subscribers, and he took no steps to repudiate the subscription or to notify the commissioners or corporation of the objection that some subscription was unauthorized. The defense now alleged was not a reason for his refusal to pay his subscription, but it was based on entirely different and inconsistent grounds. His refusal was based solely on the ground that the World's Columbian Exposition was not held on the lake front, but was located some distance south of that point. He testified that he had no knowledge of this defense until after he was sued, when his attorney informed him that a subscription by a corporation, against which such a corporation could make a defense, would enable him to evade his own obligation. Under all the circumstances, we think that he should at least have shown that the contracts which were alleged ³⁴² to be ultra vires were not performed, or that the corporations availed themselves of their privilege to deny or repudiate their obligations. Under his claim and the evidence, every dollar of every subscription made in good faith might have been paid and every contract fully executed, and yet he evade his obligation. He would not be authorized to intervene and make a defense in behalf of a corporation which it did not desire to make, and to offer it here would be to introduce a collateral issue, incapable of any conclusive determination in this case because the corporation might choose to perform its obligation or decline to make the defense if sued. To permit a defense upon such proof, where a party has stood by without notice or objection during the entire proceeding, would afford opportunity for fraud upon other subscribers and upon the general public.

Plaintiff increased its capital stock from five million dollars to ten million dollars, and it is argued that it could not recover from defendant because it was not proved that the additional five million dollars was subscribed. That question does not concern the defendant, who is one of the subscribers in anticipation of the organization of the corporation. If it was legally organized, anyone who subscribed for the additional stock would

become at once a shareholder without regard to the amount of the additional stock taken: Morawetz on Private Corporations, sec. 142.

The subscription contained the condition that the exposition should be located in Chicago, and it is said that there was no proof of the performance of that condition. The constitution of the state was amended to authorize the corporate authorities of the city of Chicago to issue bonds in the aid of the exposition to be held in the city of Chicago, and the fact that it was located and held there appears from public acts of Congress. From numerous such acts it became a historical fact of such public notoriety that the courts will take judicial notice of it.

~~363~~ The court directed an allowance of interest at five per cent from the time when the assessments became due, and it is insisted that the statute relating to interest did not warrant such an allowance. The statute authorizes a recovery of interest on all moneys after they become due on any instrument of writing. The defendant's subscription was in writing, and the amount was payable in installments as called for by the directors. It was not different in its nature from any promise in writing to pay a sum of money in installments upon demand, and when the obligation matured by the making of the call or demand, interest began to run and was properly allowed.

The judgment of the appellate court is affirmed.

CORPORATIONS—CAPITAL STOCK—LIABILITY OF SUBSCRIBER.—A subscriber to the stock of a corporation is not liable for the amount of his subscription, if the corporation fails to obtain subscriptions to the full amount of its entire capital stock: *Denny Hotel Co. v. Schram*, 6 Wash. 134, 36 Am. St. Rep. 130; but compare the note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 840; *Shick v. Citizens' Enterprise Co.*, 15 Ind. App. 329, 57 Am. St. Rep. 230.

THAT ONE CORPORATION CANNOT SUBSCRIBE TO THE CAPITAL STOCK OF ANOTHER CORPORATION, see *Denny Hotel Co. v. Schram*, 6 Wash. 134, 36 Am. St. Rep. 130, and monographic note thereto on the subject.

CORPORATIONS—BOOKS OF, AS EVIDENCE OF SUBSCRIPTION TO STOCK.—Where the name of a party appears on the books of a corporation as a stockholder, the presumption is, that he is owner of stock: *Semple v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894; and monographic note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 866, on the liability of stockholders for corporate debts.

JUDICIAL NOTICE must be taken of matters of common knowledge: *Gaynor v. Old Colony etc. Ry. Co.*, 100 Mass. 208, 97 Am. Dec. 96; and monographic note to *Lanfear v. Mestier*, 89 Am. Dec. 696, on judicial notice.

CLARK v. CHICAGO TITLE AND TRUST COMPANY.

[186 Illinois, 440.]

BANKS — ASSIGNMENT OF FUND. — A "CASHIER'S CHECK," given to a depositor, to cover the amount of a withdrawal, is merely an acknowledgment of an indebtedness on the part of the bank to the payee of the order. The change thereby made is not in the nature of the debt, but in the evidence of it. Hence such a check is not an assignment to the depositor of the amount therein specified, as against a receiver taking possession of the property of the bank, by order of court, before the check is presented to it for payment.

On Saturday, April 3, 1897, the appellant, Clark, had on deposit, in the Globe Savings Bank of Chicago, something over three thousand dollars. The hour for closing business on that day was 12 o'clock, M., and shortly before that hour Clark called at the bank and received what is called a "cashier's check" for three thousand dollars, payable to his order. This check was deposited in another bank, and on the Monday morning following it was thrown out by the clearing-house, the Globe Savings Bank having meanwhile passed into the hands of the defendant company, as receiver, by appointment of the court. No money had been set apart by the bank for the payment of the cashier's check. There was simply a credit changed from Clark's pass-book to a cashier's check. In the proceeding to wind up the affairs of the bank, Clark filed an intervening petition, claiming the money as belonging to him. There was more than enough money on hand to pay the check, though the assets of the bank were wholly insufficient to pay its indebtedness. It was found, however, that Clark was not entitled to a preference over other depositors, and there was a judgment in the lower courts in favor of the receiver. Clark appealed.

Lynden Evans, for the appellant.

Henry W. Magee, for the appellee.

443 WILKIN, J. It is impossible to perceive upon what theory of law appellant can maintain or claim that the transactions had by him with the bank on the 3d of April amounted to an assignment by the bank to him of the amount of the check. The claim seems to be based upon the law announced by this court in *Munn v. Burch*, 25 Ill. 35, and many later cases, to the effect that "the check of a depositor upon his

banker, delivered to another for value, transfers to that other the title to so much of the deposit as the check calls for, which may again be transferred to another by delivery, and, when presented to the banker, he becomes the holder of the money to the use of the owner of the check, and is bound to account to him for that amount, provided the party drawing the check has funds to that amount on deposit, subject to his check, at the time it is presented." That doctrine can have no application to the facts of this case. What is here termed ⁴⁴⁴ a cashier's check is in no sense a check within the definition of such an instrument as used in *Munn v. Burch*, 25 Ill. 35, and other similar cases. The check was not drawn by a depositor against a deposit, but was simply an acknowledgment of an indebtedness on the part of the bank to the payee of the order. As between the bank and appellant, it was, in legal effect, the same as a certificate of deposit or a certified check.

We concur in the views of the appellate court in the opinion by Mr. Justice Freeman (*Clark v. Chicago etc. Co.*, 85 Ill. App. 293), where it is said: "The drawing of the cashier's check, even if it changed the form of indebtedness, did not change the fact. The Globe Savings Bank was still indebted to the appellant for the three thousand dollars represented by its cashier's check. There was no change in the nature of the debt. The only change was in the evidence of it. . . . Appellant's counsel insist that 'it is not a question of preference; it is a question of title to money—to whom does it belong.' A creditor is entitled to money due him from any debtor. In a sense the money due belongs to him; but that fact does not change—it establishes—the relation of debtor and creditor, and subjects the parties to the rules of law governing that relation. It is urged that the giving of the check 'passed the title to the money.' That might be so . . . had the check been drawn against a fund in another bank, as against a claim for the same money by some third party. But as against a bank drawing a check upon itself no change in title was thereby made. The check was equivalent to an acknowledgment of indebtedness. The payee was entitled to the money before the check was drawn, and he or the holder of the check was entitled to it afterward in the same manner and to the same extent."

The judgment of the appellate court will be affirmed.

A BANK CASHIER'S CHECK drawn on a bank in another state, on no particular fund, does not operate as an assignment of a fund, and the holder is not entitled to preference over depositors and

general creditors of the insolvent drawee: *Harrison v. Wright*, 100 Ind. 515, 50 Am. Rep. 805. As to whether an ordinary check constitutes an assignment of a fund, the authorities are divided: See *Wyman v. Fort Dearborn Nat. Bank*, 181 Ill. 279, 72 Am. St. Rep. 259, and note to *Hemphill v. Yerkes*, 19 Am. St. Rep. 609-612, discussing the subject.

FRAZER v. CHICAGO.

[186 Illinois, 480.]

MUNICIPAL CORPORATIONS—PESTHOUSES—DAMNUM ABSQUE INJURIA.—Supposed damages growing out of the proper exercise of the police power must be considered *damnum absque injuria*. Hence a city, having express statutory authority to erect hospitals, may establish a smallpox hospital on its own property, without violating a constitutional guaranty that private property shall not be damaged for public use without just compensation; and no action for damages will, therefore, lie for injury to property in the neighborhood, where such hospital is rightfully located and well conducted.

Miles S. Gilbert, William C. Gilbert, and Gilbert Brothers, for the appellants.

Charles M. Walker, corporation counsel, and Thomas J. Sutherland, for the appellee.

⁴⁸² **PHILLIPS, J.** Appellants brought suit against the city of Chicago seeking to recover for damages to their property by reason of the erection, maintenance, and intended maintenance by it of a smallpox hospital on property belonging to the city, situated on the east side of Lawndale avenue, within the city. The property of plaintiffs is unimproved, and is situated on the west side of Lawndale avenue between West Thirty-third and West Thirty-fifth streets, and is directly opposite blocks 7 and 8 in Cass' subdivision, property owned by the city on which it built its hospital, which was opened for use December 10, 1896, said property being acquired by the city and said smallpox hospital being erected after plaintiffs acquired title to their lands on the west side of Lawndale avenue.

Plaintiffs' declaration consisted of five counts, and, without giving the substance of each count in detail, charges that the hospital was erected within fifty feet ⁴⁸³ of and facing Lawndale avenue; that the hospital has received in the two years since it had been opened, one hundred smallpox patients; that Chicago has a population of two million; that there are annu-

ally a large number of people afflicted with the disease known as smallpox; that the maintenance of this hospital for the purpose of isolating those so afflicted has damaged, and will greatly damage, plaintiffs' lands in a way not common to the general public; that smallpox is a highly contagious disease, and nearness of the hospital frightens persons and renders plaintiffs' property much less adapted for investment purposes, and limits the use which plaintiffs might otherwise make of their lands; that such acts of the defendant constitute a permanent injury for the benefit of the public, within the meaning of the section of the constitution prohibiting the damaging of private property for public use without compensation, and unreasonably limit the use to which plaintiffs' lands might be put, whereby plaintiffs have sustained special damage not common to the general public; that it became necessary to collect all persons afflicted with smallpox into one place, to guard against the spread of the disease and to facilitate treatment, and the collection of such patients at the place described renders ingress and egress to and from plaintiffs' property upon and over Lawn-dale avenue (by which public highway alone egress and ingress was then and is now possible) unsafe and dangerous to travel upon foot or in carriages or other vehicles, and greatly interferes with the private property rights which plaintiffs, as owners of land adjoining said highway, have as appurtenant to their premises, rendering said land much less adapted for investment purposes, for leasing, and for subdivision into city lots, for building sites, for the erection of dwellings for rent, and much less suitable for manufacturing sites and for residence, and that thereby the market value of plaintiffs' lands has been and is greatly decreased, to wit, fifteen thousand dollars.

⁴⁸⁴ A general demurrer to the declaration was sustained, and, plaintiffs electing to stand by their declaration, judgment was entered dismissing the suit and against plaintiffs for costs, to reverse which this appeal is prosecuted.

Appellants contend that the acts set forth in their declaration constitute a taking or damaging of private property for a public use, within the intent and meaning of section 13 of article 2 of the constitution, providing that private property shall not be taken or damaged for public use without just compensation. The position of the appellee is, that, a necessity existing for the establishment of a smallpox hospital, it was within the police power of the city to locate the same on its own property, and that any loss suffered by the plaintiffs is

damnum absque injuria, or that in contemplation of law the loss sustained by the plaintiffs is compensated for in the benefits received thereunder, and that no compensation can be had for the injuries sustained.

The case at bar presents no taking of private property, neither is there a physical injury. Nor does it fall within that class of cases where, notwithstanding there has been no taking or physical injury, together with resulting damages, yet the intrinsic value of the property is lessened by reason of access being interfered with or its accessibility is prevented or impaired. The real injury alleged and for which plaintiffs seek a recovery is the menace to the health of the inhabitants in the vicinity of the hospital, or rather, to those inhabitants who in the intended future use of plaintiffs' property might become residents in the vicinity thereof, and who, by reason of its location, would be deterred from purchasing plaintiffs' property, and the consequent loss in the speculative value thereof. Neither does it appear from the declaration that the city has been careless or negligent in the maintenance of the hospital, or that by reason of any act of omission or of commission on the part of the city it has become a nuisance to any greater extent than is inherent ⁴⁹⁵ to the location and use of such an institution. Counsel for appellant in their brief state: "We are not here complaining of any negligence of the city. We assume that the pesthouse is rightfully located and well conducted." The demurrer admits the facts well pleaded in the declaration. Does the declaration set forth a cause of action?

The seventy-seventh clause of section 1 of article 5 of the city and village act expressly gives power to the city "to erect and establish hospitals and medical dispensaries, and control and regulate the same." The establishing of this smallpox hospital was therefore clearly within the police power of the city, and it is clear, therefore, that in the absence of carelessness or negligence, or of an abuse of that power in any way, the hospital could not be a public nuisance. Nor could it be a private nuisance unless it should become such in its subsequent use or unwarranted operation, having in view the peculiar conditions under which it was established and maintained.

In *Rigney v. Chicago*, 102 Ill. 64, this court said: "There are certain injuries which are necessarily incident to the ownership of property in towns or cities which directly impair the value of private property, for which the law does not and never has afforded relief. For instance, the building of a jail, police sta-

tion, or the like will generally cause a direct depreciation in the value of neighboring property; yet that is clearly a case of *damnum absque injuria*."

In *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485, the court said: "The distinction is well established between the responsibilities of towns and cities for acts done in their public capacity in the discharge of duties imposed upon them by the legislature for the public benefit, and for acts done in what may be called their private character, as the management of property and rights held by them for their own immediate profit or advantage as a corporation, ⁴⁸⁶ although inuring, of course, ultimately to the benefit of the public. In the one case no private action lies unless it be expressly given; in the other there is an implied or common-law liability for the negligence of the officers in the discharge of such duties."

In *Carthage v. Frederick*, 122 N. Y. 268, 19 Am. St. Rep. 490, the court, in speaking with reference to the police power, said: "Municipal corporations have exercised this power for time out of mind, by making regulations to preserve order, to promote freedom of communication and to facilitate the transaction of business in crowded communities. Compensation has never been a condition of its exercise, even when attended with inconvenience or peculiar loss, as each member of a community is presumed to be benefited by that which promotes the general welfare. All authorities agree that the constitution presupposes the existence of the police power, and it is to be construed with reference to that fact."

In *Sedgwick on Constitutional Law*, 435, it is said: "The clause prohibiting the taking of private property without compensation is not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is given."

Appellants concede the well-settled rule that private property itself a nuisance and obnoxious to the health or safety of a community may be abated by a municipality, under its police power, without being liable for resulting damage to the owner thereof, but insist this case presents a condition where private property itself unoffending, and owned and acquired without

any infringement of the property or personal rights of others, has been injured ⁴⁸⁷ to a degree greater than the property of others so held and owned by them, and that the guaranty of the constitution that private property shall not be damaged for public use without just compensation therefor, applies. Conceding that the declaration shows special injury to the appellants in excess of that shared by them with the general public, it could only be under this constitutional provision that a recovery could be here maintained. The law is well settled that where a thing not *malum in se* is authorized to be done by a valid act of the legislature, and it is performed with due care and skill, in strict conformity with the provisions of the act, its performance cannot, by the common law, be made the ground of an action, however much one may be injured by it: *Rigney v. Chicago*, 102 Ill. 64. In support of appellants' contention that the acts complained of here are actionable under our constitution, reliance is placed, among other cases, on *Rigney v. Chicago*, 102 Ill. 64, *Chicago etc. Ry. Co. v. Darke*, 148 Ill. 226, and *Penn Mut. Life Ins. Co. v. Heiss*, 141 Ill. 35, 33 Am. St. Rep. 273.

There is a marked difference in the use by a city of its property carefully, prudently, and without negligence, in the reasonable exercise of its police power, and that of the change of grade of streets, the building of a viaduct, the closing of a street or alley, or the inconvenience caused by the use and operation by a railroad company of its property. In the case of the change of grade, the measure of damages allowable is the difference in the value of the property before and after the making of the improvement, taking into consideration the increased value of the improvement to the property itself. Nor, as above indicated, can there be any recovery for damages sustained, shared by the public in common. Supposed damages growing out of the proper exercise of the police power must be considered *damnum absque injuria*, in the theory of the law that the plaintiff is compensated for the injury sustained by sharing in the general benefits ⁴⁸⁸ which are secured to all by reason thereof. As stated by Dillon in his work on *Municipal Corporations*, volume 1, page 212: "Every citizen holds his property subject to the proper exercise of the police power, either by the state legislature directly, or by public or municipal corporations, to which the legislature may delegate it. . . . It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitu-

tional, though no provision is made for compensation for such disturbance. . . . If one suffers injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure."

But, finally, appellants contend that it is an unreasonable, unusual, and extraordinary use of property to utilize it for the segregation of contagious diseases, and cite in support thereof *Kobbe v. New Brighton*, 20 N. Y. Misc. Rep. 477, 45 N. Y. Supp. 777, *Mayor etc. v. Fairfield Imp. Co.*, 87 Md. 352, 67 Am. St. Rep. 344, and *Commonwealth v. Alger*, 7 Cush. 86. Under the express delegation of power by the legislature, we cannot hold that the application of property for the use of a smallpox or other hospital is such an unusual or unreasonable use of property as would take it out of the police power of the city so as to render it liable for such application, when, as here, it is conceded the pesthouse is rightfully located and well conducted. In the case of *Mayor etc. v. Fairfield Imp. Co.*, 87 Md. 352, 67 Am. St. Rep. 344, the complainants sought by injunction to restrain the city of Baltimore from placing and keeping on a twenty acre tract of land owned by the city a woman afflicted with leprosy, which land of the city adjoined lands of the complainants. There is a wide difference between the establishing and maintaining of a hospital for the treatment of disease and in appropriating a piece of property for the keeping of a single patient by an unskilled laborer and his family having no knowledge of the disease of leprosy, with ⁴⁸⁰ which the patient was afflicted. The facts appearing in that case might well have justified the interference by the court, by injunction, to restrain the use, having reference to all the surrounding conditions, and yet not militate against the view we have taken that annoyance or damage resulting from the rightful location and proper conducting of the hospital in question offers no basis for relief in damages. As was said in that case: "The evidence shows that the health authorities propose to place this woman in the charge of a laborer and his wife. They are unskilled people. They possess no authority to restrain the woman from wandering away, and they have no legal right to detain her against her will. They are not officers of the city nor clothed with any of the powers of the board of health. They are simply employed by the city to care for this woman on the city's property, where no health officer or city official is stationed." In commenting on the right to the exercise of the police power,

the court, with reference to an unreasonable exercise thereof, say: "Whatever immunity a municipality may have in exercising a public, as contradistinguished from a strictly corporate, power, it does not result from some collateral act or from the negligent doing of a permissible act. The infliction of an injury upon another is neither the natural or necessary result of an exercise of the power to build a hospital, but if injury does ensue, it would result from the collateral circumstance that the place selected was not the appropriate site or from the negligent method of doing what would otherwise be a lawful act." And this case recognized the doctrine that for the doing of an act clearly within the power of the city under its police power, where injury is the necessary result of the doing thereof, no redress can be had. The court say: "The statute law of this state confers upon the mayor and city council plenary power to establish, both within and beyond the city's limits, hospitals and pesthouses for the isolation and treatment of contagious ⁴⁹⁰ and infectious diseases. The preservation of the public health renders such legislation highly essential, and the authority of the general assembly to enact it in the exercise of the police power of the state is beyond question or controversy. Within the scope of the power thus granted the whole authority of the state is included and delegated: *Harrison v. Mayor etc.*, 1 Gill, 264. And, therefore, whatever the state may directly do in furtherance of these objects, the municipality clothed with the delegated power from the state may also lawfully perform, though there may be a difference as to the legal consequences resulting from an exercise of the power by the state directly and those flowing from an exercise of the same power by the municipality. If it be conceded that the state may, in exercising a public power, create a private nuisance with immunity, the immunity grows out of the public necessity and rests upon the state's sovereignty; but it cannot, or, at all events, will not, in the absence of an explicit legislative delegation, be assumed that the state would, if directly exercising the same power, so exercise it as to produce or cause an injury to the rights of property to an individual, unless, perhaps, the very doing of the act directed to be done will necessarily and unavoidably, under any condition, result in the creation of what would be, but for the authorization, a private nuisance."

We can see no difference, in principle, between the right of a city to establish and maintain a smallpox hospital and to erect and use jails, fire-engine houses, calaboozes, and the like.

Greater care might be required in the maintenance of one than the other, and different considerations would undoubtedly enter into the selection of a site of a pesthouse than of the fire-engine house or jail, but the city would be liable only for an abuse of authority or an unwarranted exercise of discretion in locating or maintaining the same, having reference to the present necessities, the crowded condition of the locality ⁴⁹¹ in which they are placed or maintained, and other pertinent facts and circumstances. The declaration does not seek to charge any act of omission in this regard.

The demurrer was properly sustained, and the judgment of the circuit court of Cook county is affirmed.

MUNICIPAL CORPORATIONS — ERECTION OF PRISON BUILDING—DAMNUM ABSQUE INJURIA.—A city does not invade property rights by merely erecting and maintaining a necessary prison building within its limits. Hence no action for damages can be maintained against the city therefor by the owner of adjacent property injured thereby, as the injury to one's business and the depreciation of property in such a case are *damnum absque injuria*: *Long v. Elberton*, 109 Ga. 28, 77 Am. St. Rep. 363.

BETSER v. BETSER.

[186 Illinois, 537.]

HUSBAND AND WIFE—HER RIGHT OF ACTION FOR ALIENATION OF HIS AFFECTIONS.—Under statutes which recognize the separate property rights of a wife and permit her to sue without joining her husband, she has a right of action against a third party for alienating her husband's affections.

Tipton & Tipton, for the plaintiff in error.

Welty & Sterling and John E. & Mayne Pollock, for the defendant in error.

⁵³⁷ **WILKIN, J.** Elizabeth Betser and William Louis Betser, called Louis Betser, were married in McLean county, Illinois, on the twenty-sixth day of November, 1889, and lived together in that county from that time until about December 28, 1898, when they separated. To the September term, 1899, of the circuit court of McLean county the wife brought this action on the case against Shepherd B. Betser for alienating her husband's affections, by reason whereof he deserted and abandoned her. Shepherd B. and Louis Betser are brothers. The

general issue and two special pleas were filed on behalf of the defendant, but demurrer being sustained to the special pleas, a trial by jury was had on the plea of not guilty alone. The verdict was for the plaintiff, assessing her damages at three thousand seven hundred dollars, on which ⁵³⁸ judgment was regularly entered. The defendant appealed to the appellate court for the third district, where he, by his counsel, insisted that the circuit court erred in overruling a demurrer to the declaration and in sustaining demurrer to the special pleas; also in the admission and rejection of evidence and the giving and refusing of instructions. Each of these grounds of reversal was overruled and a judgment of affirmance entered, to reverse which this writ of error has been sued out.

The grounds of reversal in this court are stated by counsel to be: 1. In holding the declaration stated a cause of action; and 2. In holding that the plaintiff could recover damages for loss of consortium. In fact, the only question here raised is whether a wife, in this state, has a right of action against a third party for alienating the affections of her husband. Incidentally, it is claimed that the plaintiff is barred of her right of action in this case, even if otherwise entitled to maintain it, by a contract between her husband and herself, entered into after the separation. That contract in no sense waived any right of action against the defendant for the loss here sued for, and we deem it unnecessary to add anything on that branch of the case to what has been said by the appellate court in its opinion. We also concur in the view of that court, as expressed in its opinion, on the principal question in the case; but as there is some diversity of opinion on the subject, and the case being one of first impression in this court, it is thought proper to give it further consideration.

The authorities uniformly hold that a husband has a right of action at common law for alienating the affections of his wife or enticing her away from him; but the weight of authority, at least in a number of cases decided, holds that the wife cannot maintain a similar action for the loss of the affections or society of her husband. This discrimination against the wife has its origin in the ancient common-law doctrine that the husband and wife ⁵³⁹ are one, that one being the husband and the wife's rights merged in him. That idea has, however, been exploded by the enlightenment of the present age and by legislation.

One of the difficulties which some of the courts find in giving the wife the right to sue in such a case is, that she could only bring the action by joining her husband with her as a party plaintiff. It will be unnecessary to inquire as to the soundness of that decision, it being, as we think, now clearly settled, if not universally held, that where a statute has removed the disability of the wife to sue, vesting in her separate rights in property, she may, on the same grounds and with the same right as her husband, recover for loss of the affections of her husband, against one who has wrongfully deprived her of them. In an extended note to *Clow v. Chapman*, 46 Am. St. Rep. 474, it is said: "It has, therefore, been held by state courts other than those of Maine and Wisconsin, that a wife may, without joining her husband, maintain an action to recover damages for the alienation of his affections, and the consequent loss of his society, assistance, and support, if, under the statutes of the state under which she prosecutes her action, she is given power to sue for personal wrongs without joining her husband": Citing a long list of authorities.

Section 1 of chapter 68 of our statutes provides that a married woman may in all cases sue and be sued without joining her husband with her, to the same extent as if she were unmarried. Few, if any, state legislatures in this country have gone further to secure to a wife all of her separate rights without interference on the part of the husband than has the legislature of this state. In *Bigelow on Torts*, 153, this language is used: "To entice or corrupt the mind and affections of one's consort is a civil wrong, for which the offender is liable to the injured husband or wife. The gist of the action is not the loss of assistance, but the loss of consortium of the husband or wife, under which term are included the person's affections, ⁶⁴⁰ society, and aid." In *Schouler on Husband and Wife*, section 143, page 171, and *Cooley on Torts*, page 227, the doctrine is announced that, except for the fact of coverture, there is no reason why such an action could not be maintained by the wife.

Upon what reasoning it could be held that a loss of the affections of a husband is less real and substantial than the loss of the affections of a wife we cannot perceive. We entertain no doubt that by the clear weight of both reason and authority a wife has, under our statute, precisely the same right of recovery for such a loss as the husband. Under this

view of the law, every material controverted fact being found against the plaintiff in error, the judgment of the appellate court must be affirmed.

ALIENATION OF HUSBAND'S AFFECTIONS.—A MARRIED WOMAN can maintain an action against a third person for the alienation of her husband's affections: *Reed v. Reed*, 6 Ind. App. 817, 51 Am. St. Rep. 310; *Price v. Price*, 91 Iowa, 693, 51 Am. St. Rep. 360; and monographic note to *Olow v. Chapman*, 46 Am. St. Rep. 472-478, discussing the question.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

MEDILL v. SNYDER.

[61 Kansas, 15.]

WILLS—ESTOPPEL TO CONTEST—RETURN OF BENEFITS.—A legatee under a will who accepts a legacy in ignorance of his rights in the premises may, upon the discovery of such rights, and upon the return or offer to return what he has received under the will, proceed to contest its validity and to assert his rights in the estate under the law.

WILLS—CONTEST—FINDINGS OF TRIAL COURT CONCLUSIVE.—The credibility of witnesses and the probative force of the facts as to testamentary incapacity in a contest of a will are for the determination of the trial court, and if it appears that there was legal evidence to support such court's findings, the question is not open to further consideration on appeal.

WILLS—CONTEST—FINDINGS OF JURY.—In an action contesting the validity of a will, the court may call a jury, and may accept or adopt its findings in whole or in part, or it may ignore them and upon independent consideration of the evidence make findings of its own. If the latter course is pursued and judgment rendered accordingly, the errors of the jury become immaterial.

EVIDENCE.—HYPOTHETICAL QUESTIONS may be based upon any assumption of facts which the testimony tends to prove, according to the theory of the examining counsel.

INSANE DELUSION MAY EXIST, although the belief entertained is not a physical impossibility. If, however, such belief is entertained against all evidence and probability, and after argument to the contrary, it affords ground for the inference that the person entertaining it labors under an insane delusion.

O. C. Phillips, W. Dill, and Waggener, Horton & Orr, for the plaintiff in error.

W. C. Hook, J. H. Atwood, and J. A. Reed, for the defendants in error.

¹⁶ JOHNSTON, J. On the third day of July, 1894, James Medill died in Leavenworth, having made a will on the 12th of the previous month devising to his family an estate of the estimated value of eighty thousand dollars. He gave to his daughter, Nana Medill, the home in Leavenworth and the furniture therein, and directed that fifteen thousand dollars of mortgages and securities be set aside for her use, the income of which should be paid to her semi-annually during her life, the fund to be managed by the son, Sherman Medill, who was made executor. The day before his death a codicil to the will was executed by him, adding two thousand dollars to the fund set aside for Nana. The will provided that at her death the trust fund should go to the heirs of her body, if any, and if there were none, that it should be paid to the heirs of Sherman Medill. The will also set apart five thousand dollars, the income of which should be paid to Fairy M. Hollingsworth, the child of a deceased daughter of the testator, the management of which was also placed in Sherman Medill, and it was provided that if her marriage should be unsatisfactory to him, or she should die, the fund or property should go absolutely to and become the property of Sherman Medill. The sum of three thousand dollars was devised to a son of Sherman Medill, and all the residue of the estate was devised absolutely to Sherman Medill. The will was probated on July 6, 1894, and in the succeeding month seventeen thousand dollars in value ¹⁷ of securities was set apart for the use of Nana, and was approved and accepted by her.

On September 5, 1895, Nana brought this action, alleging that her father was not of a sound and disposing mind when the will and codicil were executed, and that in the execution he was subjected to undue and improper influences by Sherman Medill, to whom most of the estate was devised; and for these reasons she asked that the will be set aside. Fairy M. Hollingsworth appeared by her guardian, and in her answer attacked the will, alleging that when it was made the testator did not have sufficient mental capacity to execute a will, and, further, that undue influence was exerted on him. Sherman Medill denied these averments, and pleaded that Nana, having selected certain securities in pursuance of the will, and having accepted them in writing, as well as other benefits under the will, was estopped to maintain an action to contest and set it aside. A jury was called to aid the court, and on the testimony

produced the jury found against Sherman Medill, and returned the following special findings of fact:

"1. Was the testator, James Medill, of sound mind and memory at the time he executed the will in question? A. No.

"2. Was the testator, James Medill, of sound mind and memory at the time he executed the codicil to the will in question? A. No.

"3. Was the execution of the will in controversy due to and the result of undue influence exerted upon the testator? A. Yes.

"4. When the plaintiff, Nana Medill, received property and money from her father's estate under the provisions of the will in question, did she do so in ignorance of her rights and without having knowledge of or being advised of the facts urged by her as grounds for setting aside the said will? A. Yes."

¹⁸ The court thereupon approved, ratified, and confirmed the verdict and findings of the jury, and on its own motion and from the evidence adduced in the cause made its findings of fact, as follows:

"1. That at the time of the signing of the will in question the testator, James Medill, was not of sound mind and memory.

"2. That at the time of the signing of the codicil to the will in question the testator, James Medill, was not of sound mind and memory.

"3. When the plaintiff, Nana Medill, received property and money from her father's estate under the provisions of the will and codicil in question in this cause, she did so in ignorance of her rights and without having knowledge of or being advised of the facts urged by her as grounds for setting aside the said will and codicil, and that she did not have such knowledge and was not so advised until shortly before the commencement of this action."

The court thereupon entered a judgment vacating and annulling the will, and directing that the estate be administered as though James Medill had died intestate.

The first point contended for is that Nana Medill, having received and retained property under the will, has recognized its validity and is estopped to deny it. That is conceded to be the general doctrine, but it can have no application if she acted in ignorance of the facts and her rights in the premises. It is true she did not institute a contest until more than a year after her father's death, and that during that time she proceeded as though the will was valid, accepting and using the prop-

erty and funds set apart for her as the will provided. Her testimony tended to show, however, that she did not learn the important facts relied on to show testamentary incapacity, nor what her rights were, ¹⁹ until about the time the action was begun. She was acquainted with some of the circumstances cited to show unsoundness of mind, but there is testimony that many of the controlling facts indicating incapacity were unknown to her, and that she did not understand or learn that she could attack the will on such grounds until about the time the action was taken. As soon as she learned the facts and understood her rights, she challenged the validity of the will and tendered back what she had already received under the will. It would seem from the testimony that her conduct did not induce a change of position by Sherman Medill, nor operate as a fraud upon him, and it cannot if all that she received under the will is restored to the estate. This is an essential element of equitable estoppel. In *Matter of Peaslee*, 73 Hun, 413, 25 N. Y. Supp. 940, it was held that, "where a legatee named in a will is paid a portion of her legacy by the executors thereof, she is not in a situation to attack the will until she puts the parties in a position where, whatever the result may be, no one can be the loser, because of the payments originally made to her." Here the legatee who accepted the benefits has offered to restore what was received, and, as we have seen, no one can be prejudiced or be the loser by her conduct.

In *Hamblett v. Hamblett*, 6 N. H. 333, the court decided that "a party who has received a legacy under a will cannot be permitted to contest the validity of such will without repaying the amount of the legacy or bringing the money into court." In *Holt v. Rice*, 54 N. H. 402, 20 Am. Rep. 138, it was held that the receipt of a legacy is to a certain extent an affirmation of the will, but that it is not an absolute bar to an action to annul the same; that a party desiring to attack the will should make restitution of the money or benefits received, when the contest may proceed. The supreme court of Pennsylvania holds that an election in pais to take under a will should be intelligently made, and should be unambiguous and positive in its character, to amount to an estoppel. The rule seems to be that "a legatee who has received his legacy, and afterward concludes to contest the will, may return the legacy to the executors and so relieve himself from the operation of the general rule that forbids him to take under the will that which the testator

gave him, and at the same time deny its validity as to others": *In re Miller's Estate*, 159 Pa. St. 562.

The offer of restoration made by Nana Medill in her pleading was sufficient in a case of this character: *Thayer v. Knote*, 59 Kan. 181. We think that she ought not to be concluded if she did not comprehend her rights nor understand the facts bearing upon the invalidity of the will, and the trial court correctly instructed the jury that her acceptance of benefits would not conclude her if they found "from the evidence that such act was done in ignorance of her rights and without having knowledge of or being advised of the facts urged by her as grounds for setting aside the will."

A vigorous attack is made upon the finding that James Medill was not of a sound and disposing mind when the will was executed. We find much in the testimony strongly tending to show that he was sane and capable until shortly before his death, and if we were the triers of the fact we might hesitate on the testimony in the record to find testamentary incapacity. However, many circumstances were shown and much expert and other evidence produced going to show unsoundness ²¹ of mind and tending to sustain the findings. The credibility of witnesses and the probative force of the facts were for the trial court, and it appearing that there was legal evidence to support the finding, the question is not open to further consideration.

There is very little testimony which tends to show that the execution of the will was the result of undue influence exerted upon the testator, but as the judgment of the court rests on testamentary incapacity alone, the point of insufficiency of evidence to establish undue influence is no longer material. While the jury found undue influence, the court, acting independently upon the testimony, and probably not being satisfied with the testimony offered to support that ground, did not find that there was undue influence. The action of the court in calling the jury was discretionary. For its own convenience or to satisfy its conscience it can refer questions of fact to the jury, but the court is not bound by the findings made, and may ultimately determine for itself all the questions in the case. It may accept and adopt the findings of the jury in whole or in part, or it may ignore them and upon independent consideration of the evidence make findings of its own; and when the latter course is pursued the mistakes of the jury may be of little consequence. If the court had tried the case as though a jury

trial was a matter of right, and had accepted and adopted as its own the findings of the jury without giving independent consideration to the facts, the errors of the jury might be worthy of consideration as grounds of reversal: *Vickers v. Buck Stove etc. Co.*, 60 Kan. 598. It is contended that the court in this instance adopted the findings of the jury, and that therefore the errors committed by the jury are available ²² in this court. The record shows that after the general and special findings of the jury were returned the court approved and ratified them, but it is clear from what followed that the court was unwilling to adopt or make them its own. The court afterward, on its own motion, took up the entire case, and upon the evidence made independent findings, on which its judgment is based. The finding as to testamentary incapacity at the time the will was executed is the same as that of the jury, while that as to undue influence was entirely omitted, and the finding that Nana Medill accepted benefits in ignorance of her rights differs from the one made by the jury on that subject, and enlarges it by the finding that she did not have such knowledge and was not so advised until shortly before the commencement of the action. The action of the court in determining the facts from the evidence for itself renders the objections to the findings made by the jury unimportant, as well as several other objections urged against rulings made in presenting the case to the jury: *Rich v. Bowker*, 25 Kan. 7; *Delaney v. Salina*, 34 Kan. 532; *Stickel v. Bender*, 37 Kan. 457; *Franks v. Jones*, 39 Kan. 236; *Hudson v. Hughan*, 56 Kan. 152; *Caldwell v. Brown*, 56 Kan. 566. It disposes of the point that the finding of testamentary incapacity negatives the finding of undue influence. We are not prepared to assent to the proposition that the two issues were irreconcilably inconsistent, but however that may be, there is no such inconsistency where the judgment annulling the will rests on the ground of testamentary incapacity alone.

We find nothing substantial in the objection to the rulings on the evidence. A number of extended hypothetical ²³ questions were submitted to expert witnesses, and it is contended that they did not correctly state the facts brought out in the evidence. Our examination of the record leads us to the opinion that they were within the range of the testimony offered by the parties attacking the will. While the proof in support of some of the facts was slight, "a hypothetical question may be based upon any assumption of facts which the testimony

tends to prove, according to the theory of the examining counsel": 8 Ency. of Pl. & Pr. 757. There appears to have been some evidence sustaining the assumed facts, and we cannot say that the questions were objectionable in form.

Complaint is made of an instruction to the effect that the testator might be capable of transacting the ordinary business affairs of life and sane on other matters, but that if the will was influenced and the direct offspring of an unfounded and insane delusion it could not be sustained. Plaintiff in error says that a "delusion is a belief in something impossible in the nature of things or the circumstances of the case," and it is argued that supposed relations and a prospective marriage between Nana and her brother in law, who was greatly disliked by the testator, was not impossible. While the definition given may be found in the books, it is a too narrow conception of the term to say that it is a belief in something that is impossible: 1 Bouvier's Law Dictionary, 537; Wharton on Criminal Law, sec. 37. The things believed may not exist, and there may be no grounds whatever for the belief, and yet their existence may not be a physical impossibility. An instance cited is the persistent and wholly unfounded notion that a wife is guilty of adultery. Another example is where ²⁴ a parent, without the slightest pretense or color of reason, unjustly persists in attributing to a daughter a gross vice and uses her with uniform unkindness. Another is where a person, without cause or reason, insists that those who had administered medicine to him in sickness had given him poison. These things are not physical impossibilities, but if such a belief is entertained against all evidence and probability and after argument to the contrary, it would afford grounds for inferring that the person entertaining it labored under an insane delusion. We think the instructions cannot be regarded as erroneous, and, since the court made its own findings of fact from the evidence, the instruction is not of great consequence.

We find nothing in the admission of evidence or in the instructions to the jury that furnishes ground for reversal, nor is there anything substantial in the objections that there was misconduct of the prevailing parties and by the jury. The important questions in the case arise upon the facts, and these having been determined in favor of the defendants in error upon sufficient evidence, we are constrained to affirm the judgment.

WILLS—ESTOPPEL TO CONTEST.—One who receives a legacy under a will is estopped to contest the validity of the will, without repaying the amount of the legacy or bringing the money into court: *Holt v. Rice*, 54 N. H. 398, 20 Am. Rep. 138. See, further, on this subject, *Fifield v. Van Wyck*, 94 Va. 557, 64 Am. St. Rep. 745; *Madison v. Larmon*, 170 Ill. 65, 62 Am. St. Rep. 356.

WILLS.—IF, IN AN ACTION CONTESTING the validity of a will for want of mental capacity in the testator and for undue influence exerted upon him, the evidence on these issues is conflicting, they should be submitted to the jury, and its decision is final: *Manatt v. Scott*, 106 Iowa, 203, 68 Am. St. Rep. 293.

ON INSANE DELUSIONS, see the monographic note to *People v. Hubert*, 63 Am. St. Rep. 80-108.

A HYPOTHETICAL QUESTION propounded to an expert witness, if founded upon facts which the evidence tends to establish, is admissible, and it is not essential that such facts should have been proved actually to exist: *Manatt v. Scott*, 106 Iowa, 203, 68 Am. St. Rep. 293. See, too, *State v. Peel*, 23 Mont. 358, 75 Am. St. Rep. 529.

SEELEY v. JOHNSON.

[61 Kansas, 337.]

JUDICIAL SALES—DORMANT JUDGMENT.—A sale of land made upon a special execution issued after the death of the judgment plaintiff, without a revivor of the judgment, is absolutely void.

Hodgson & Hodgson, for the plaintiff in error.

R. P. Kelley and W. S. Marlin, for the defendants in error.

337 SMITH, J. The question involved in this suit is whether a sale of real estate made under a special execution issued on a judgment in foreclosure after the death of the plaintiff, without a revivor, is of any validity. Many authorities have been collected by counsel on both sides. In determining the law applicable to the case we think it unnecessary to go beyond the precedents established by this court. In *Halsey v. Van Vliet*, 27 Kan. 474, two executions were issued after the death of a defendant—the first one within four months thereafter, and the second twelve months later. It was held that the executions were to be considered absolute nullities, and that, there being no party defendant in being against whom or whose property the process could run, their issuance and return did not have the effect of keeping the judgment alive. In *Commissioners etc. v. Lawrence*, 29 Kan. 158, pending a civil action against a defendant, and prior to the trial thereof, he

was imprisoned in the ³³⁸ penitentiary under a conviction and sentence for felony for a term less than his natural life, without the appointment of a trustee to manage his estate or defend the action. While thus confined a judgment was obtained against him. His civil rights were at the time suspended. It was held that the judgment was a nullity and might be revoked and set aside by proper proceedings had before the court rendering the same. It was not decided in this case whether the judgment against the convict was void or merely voidable.

In *Ballinger v. Redhead*, 1 Kan. App. 434, a judgment was rendered in favor of a partnership composed of two persons. One of the partners died and execution was issued on the judgment about eight months thereafter and real estate sold thereunder. No revivor was had. It was held that no execution could legally issue, and that all proceedings had after the death of one of the plaintiffs in the judgment were void. In *Halsey v. Van Vliet*, 27 Kan. 474, Mr. Justice Brewer, in rendering the opinion, quotes from *Freeman on Executions*, section 35, as follows: "The issuing of executions against sole defendants, bearing date after their death, has also given rise to diverse decisions; but upon this point the authorities are much more unevenly divided than upon that arising where execution has issued after the death of a sole plaintiff. Some of the authorities deny that the death of the defendant is an extinguishment of the power to issue execution, and affirm that a writ thereafter issued, without revivor of the judgment, though voidable, is not void. These authorities, while sustainable on principle, are borne down by the weight of opposing authority."

It will be noticed from a careful reading of the opinion in the case quoted from that Mr. Justice Brewer did not disagree with his associates in holding ³³⁹ that a sale under a writ issued after the death of a defendant was void in so far as title was affected by such sale. The learned justice was of the opinion that, so far as the question of keeping the judgment alive was concerned, such executions cannot be considered nullities. He said: "The majority of the court, however, hold with the current of authority, that such an execution is an absolute nullity; that under it a sale is absolutely void, passing no title; that it can be challenged in any collateral way, and that being an absolute nullity, it is powerless, not only for upholding a sale, but also for keeping alive the judgment in behalf of the plaintiff."

Upon the death of the plaintiff in the judgment at bar it became dormant. No distinction is made under our statute between a revivor in the case of the death of a defendant and that of a plaintiff. In both instances a revivor is necessary. Sections 438 and 439 of chapter 95 of the General Statutes of 1897 (Gen. Stats. 1899, secs. 4704, 4705) read:

"Sec. 438. If either or both parties die after judgment and before satisfaction thereof, their representatives, real or personal, or both, as the case may require, may be made parties to the same in the same manner as is prescribed for reviving actions before judgment; and such judgment may be rendered and execution awarded as might or ought to be given or awarded against the representatives real or personal, or both, of such deceased party.

"Sec. 439. If a judgment become dormant, it may be revived in the same manner as is prescribed for reviving actions before judgment."

In the case of *Green v. McMurtry*, 20 Kan. 189, 194, Mr. Justice Valentine, speaking for the court, said: "In some cases, after jurisdiction has been obtained, and some particular proceeding has been commenced ³⁴⁰ before the death of either party, such particular proceeding may be carried on to completion after the death of one or both of the parties, the whole thing relating back to the time of the commencement of the proceeding. This is illustrated by a sale of property on execution after the death of one of the parties, where the property was levied on under such execution before such death. Also in some cases where the proceeding is a mere formal matter, like the rendering of a judgment after death on a verdict found before death, the proceeding may be had after such death. But even these cases have their exceptions and limitations."

In the case at bar there was no plaintiff in being at the time the order of sale was issued, levied and the property sold. It is the policy of our law, evidenced by those provisions of the statute relating to revivor, that proceedings in court should be had only between persons in esse, and that executions and orders of sale should be issued and levied in case of the death of either plaintiff or defendant only after revivor.

Counsel for plaintiff in error have not convinced us that there should be a difference in effect as to an order of sale issued after the death of the plaintiff as distinguished from a general execution. In the case of *Ashmore v. McDonnell*, 16 Pac. Rep. 687, decided by this court in January, 1888, but not reported,

a decree in foreclosure was rendered against a defendant, Ashmore, before his conviction and sentence to the penitentiary for life, and execution issued afterward. Clogston, commissioner, speaking for the court, said: "The judgment was rendered before this conviction, but no execution was issued thereon until more than six months after his conviction and sentence. This conviction deprived the plaintiff of all civil rights, and before an execution could be issued thereon, this judgment would have to be revived. This not having been done, the execution was issued upon a dormant ³⁴¹ judgment, and was of no validity. The execution being void, all proceedings thereunder must necessarily follow the execution, and the purchaser took nothing by reason of the sale and conveyance thereunder."

In the opinion the words "execution" and "order of sale" are used interchangeably. On a rehearing of this case (*Ashmore v. McDonnell*, 39 Kan. 669, 679, Mr. Chief Justice Horton rendering the opinion), the decision was modified on a review of the facts. The rule of law stated by the commissioner, however, was not doubted, the court saying: "If the action of McDonnell to foreclose his mortgage had been instituted against Ashmore alone, or if a general judgment had been rendered against Ashmore alone, the decision of this court heretofore rendered would be correct": See, also, *Kansas etc. Ry. Co. v. Smith*, 40 Kan. 192; *Cunkle v. Interstate R. R. Co.*, 54 Kan. 194.

A defendant whose property is levied upon under an order of sale or general execution ought to be able to ascertain from an inspection of the record in the case to whom payment of the debt may be made, and when the death of the owner of the judgment occurs, all proceedings for its enforcement ought to be held in abeyance until some person in being is substituted with whom the debtor may treat regarding the satisfaction of the judgment.

In the case of *Kager v. Vickery*, 61 Kan. 342, post, p. 318, immediately following, involving the validity of a judgment after the death of a defendant, Mr. Chief Justice Doster, speaking for the court, confirms the view we have taken of the question, and has cited authorities in support thereof not referred to herein.

The proceedings under the order of sale being void, whether this attack upon them in an action of ejectment was direct or collateral becomes immaterial. The judgment of the court below will be affirmed.

EXECUTION—DEATH OF PARTY.—A sale under an execution issued after the death of the defendant, without a revival of the judgment, is not void, but only voidable: *Shelton v. Hamilton*, 23 Miss. 496, 57 Am. Dec. 149; *Elliott v. Knott*, 14 Md. 121, 74 Am. Dec. 519. See, further, *Blanks v. Rector*, 24 Ark. 496, 88 Am. Dec. 780; *Boyle v. Maroney*, 73 Iowa, 70, 5 Am. St. Rep. 657.

KAGER v. VICKERY.

[61 Kansas, 842.]

JUDGMENTS AGAINST DEAD PERSONS—COLLATERAL ATTACK.—A judgment against a deceased defendant theretofore duly served with process is void, and both such judgment and a sale under execution in satisfaction thereof may be collaterally attacked.

C. L. Brown, for the plaintiffs in error.

C. T. Atkinson, J. E. Torrence, Madden & Buckman, Jackson & Love, and Pollock & Lafferty, for the defendants in error.

³⁴² **DOSTER, C. J.** This was an action in ejectment for partition, and for the rents and profits of the land. Eustace B. Kager was at one time the owner of the tract in dispute. He and his wife, Ada L. Kager, executed a mortgage on the land to secure the payment of money. They made default in the payment of the debt, and on the ninth day of September, 1878, suit to foreclose the mortgage was brought in the circuit court of the United States for the district of Kansas. On the twenty-third day of September, 1878, they were both duly served with a subpoena in chancery issued in the case. On January 8, 1879, the defendant Eustace B. Kager died intestate, leaving surviving him his wife, Ada, and two minor children. These two children were the plaintiffs in the action of ejectment in the ³⁴² court below and are the plaintiffs in error in this court. On July 15, 1879, final decree was rendered and entered in the foreclosure action against the defendants, Eustace B. and Ada L. Kager. This decree adjudged the amount due on the mortgage indebtedness and directed a sale of the land to be made to satisfy it.

The sale was made on the 23d of February, 1880, and on the fifth day of April, 1880, the sale was confirmed and a deed executed to the purchaser, one J. B. Watkins. By mesne conveyances the title of Watkins has been transferred

to Ira M. Vickery, the defendant in the ejectment suit and the defendant in error here. B. N. Kager and Ada Kager, the children and heirs of Eustace B. Kager, having arrived at majority, instituted an action for the partition of the land and to recover an undivided one-half of it, and for the rents and profits of such portion, on the theory that their ancestor having died before the rendition of the decree of foreclosure such decree was a nullity, and could not be made the basis of the sale that was had and the deed that was executed. It is to be assumed that the decree was procured by complainant's counsel and rendered by the court in ignorance of the previous death of the defendant Eustace B. Kager.

Upon the above-recited state of fact these questions arise: Were the foreclosure decree rendered by the circuit court on the fifteenth day of July, 1879, and the succeeding sale and deed void as to the plaintiffs in error, and subject to the collateral attack made on it, by reason of the death of Eustace B. Kager on the eighth day of January, 1879, after the bringing of suit and service of process upon him? or, Did his death render the proceedings had thereafter voidable only and not subject to collateral attack? The court below ruled that the decree and other proceedings were ³⁴⁴ not void, but were voidable only, and, therefore, could not be collaterally attacked. From this ruling the plaintiffs below have prosecuted error to this court. In our judgment the contention of the plaintiffs in error is sound and must prevail. The foreclosure decree and subsequent proceedings were void and constituted no basis for a claim of title. Upon the precise question involved, counsel for plaintiffs in error has not carried his investigation of the authorities along the entire line of decisions applicable thereto, and because thereof we have been compelled to make such independent research as the multiplicity of our labors would allow, and in consequence have rested our judgment largely upon what appears to be the reason and principle of the question and less upon the authority of adjudged cases. We are free to confess that the position of the defendants in error is supported by the greater weight of authorities numerically considered. In the *Encyclopedia of Pleading and Practice*, volume 11, page 843, it is said: "As to the validity of a judgment rendered for or against a party after his death the authorities seem to be hopelessly irreconcilable. Thus, according to numerous decisions, such judgments are utterly void and may be collaterally attacked. The decided weight of authority, however, seems to

be that if a court of general jurisdiction, or a court which has acquired full jurisdiction over the cause and over the parties, renders a judgment for or against a party after his death, the judgment is not for that reason void. Such a judgment, while erroneous and voidable when properly assailed in a direct proceeding for that purpose, is valid until reversed by some appropriate proceeding, and may not be collaterally attacked."

In Freeman on Judgments, fourth edition, volume 1, section 153, it is said: "The decisions respecting the effect of judgments ³⁴⁵ for or against persons who were not living at the time of their rendition are conflicting and unreasonable. Some of them apparently affirm that a judgment so rendered is void under all circumstances, and others that it is valid under all circumstances, because its rendition implies that the parties for and against whom it was given were then living, and that to show that either was then dead is to dispute the verity of the record, and, therefore, not permissible."

In Black on Judgments, volume 1, section 200, it is said: "The great preponderance of authority is to the effect that, where the court has acquired jurisdiction of the subject matter and the persons, during the lifetime of a party, a judgment rendered against him after his death is, although erroneous and liable to be set aside, not void nor open to collateral attack."

However, in the preceding section (199) the author says: "At the common law an action was abated by the death of a sole plaintiff or defendant. And in some of the states the doctrine appears to be irrevocably settled that a judgment against a person who was dead at the time of its rendition is absolutely null and void."

In Life Assn. of America v. Fassett, 102 Ill. 315, the court says: "Much of the confusion and uncertainty which prevail in the authorities on this subject is attributable, doubtless, to the fact that courts, in jurisdictions where the common-law system obtains, in attempting to follow the adjudications of other courts, have failed to distinguish the cases resting on purely common-law grounds from those resting, in whole or in part, upon statutes modifying the common law. A careful examination of the authorities clearly shows that a judgment by the common law, in the absence of any statutory provisions on the subject, against a dead ³⁴⁶ person, either natural or artificial, is absolutely void, and the fact that service may have been obtained, or the suit commenced, before the death of the

party, makes no difference in this respect; and this was unquestionably the rule from the earliest period of the common law down to the seventeenth year of the reign of Charles II, when the British parliament passed the first act somewhat modifying the common law on the subject: *Randel's Case*, 2 Mod. 308; 1 Salk. 8; 2 Sand. 72, note m. The rule of the civil law was the same: 7 Robinson's New Practice, 157.

"By statute (17 Charles II, c. 8, sec. 1) it was enacted, in substance, that the death of neither plaintiff nor defendant, between verdict and judgment, should be assigned for error, provided the judgment should be entered up within two terms after such verdict. The courts of Westminster, in giving a construction to this act, held that where a party—and there was no difference between plaintiff and defendant in this respect—died in term time, though before verdict, the cause might nevertheless proceed to trial and judgment, upon the theory the entire term was in contemplation but one day: 2 Sand. 72, note m. The judgments in these cases were entered in precisely the same manner as if the death of the party had not occurred, and the statute applied as well where the right of action did not survive to or against the legal representatives of the deceased party, as where it did: 2 Sand. 72, note m.

"The next legislation on the subject was the statute of 8 & 9 William III. Section 6 of chapter 11 of that act provided, in substance, that in all actions to be commenced in any court of record, if the plaintiff or defendant should happen to die after interlocutory and before final judgment, the action should not by reason thereof abate, if such action could be originally prosecuted or maintained by or against the executors or administrators of the party dying; but the plaintiff in such case, or, in the event of his death after such interlocutory judgment, his executors or administrators, might have a *scire facias* against the defendant, or, if he should die after such interlocutory judgment, then against his executors or administrators, to show ³⁴⁷ cause why damages should not be assessed or recovered in such action, etc. It will be perceived that this act is in some of its main features much like our own statute on this subject, and is doubtless the original from which our own was modeled, though ours is unquestionably a great improvement on the English model. This act, it will be further observed, extends only to cases where the death of either party occurs after an interlocutory judgment.

"This brief reference to the earlier decisions founded on the common law and subsequent legislation on the subject clearly shows that the idea that a judgment against a dead person is voidable only had its origin in the construction given to the act of 17 Charles II, above mentioned, and any extension of the doctrine to cases not falling within that act, or other acts of a similar character, would, on principle, be a clear misapplication of it. It is also to be observed that these statutes, having both been passed since the fourth year of the reign of James I, are not of any binding force in this country, and it is clear the decisions of the English courts construing them are likewise, on principle, of no authority here, and so far as they have been acted upon by the courts of this country in deducing the common law as to the effect of a judgment for or against a dead person, they have led, as already remarked, to much misapprehension and confusion on the subject. Such a judgment, when tested by the common law alone, as we have already seen, is absolutely void."

It is proper, however, to say that in the subsequent case of *Clafin v. Dunne*, 129 Ill. 241, 16 Am. St. Rep. 263, the supreme court of that state repudiated the quotation we have made from *Life Assn. v. Fassett*, 102 Ill. 315, as being a dictum. Therefore, we have not made the quotation as expressive of the rule of authority in Illinois, but as the pertinent and deliberate declaration of eminent judges on the abstract question of law, and also historically on the origin and progress of the innovation in the common law made by the cases holding to a ³⁴⁸ contrary doctrine. In the view of Mr. Black, and also in the view of the supreme court of Illinois as first expressed, it would appear that at common law a judgment against a dead man was a nullity. We have not been able to examine many of the numerous decisions which appear to hold to the contrary. It is altogether likely that the reasons for the complete reversal which they have made of the common law upon the subject have been, in many instances, influenced by statutory provisions. Some of the cases we have read appear to have been so influenced. To hold that a valid judgment can be rendered against a dead man—that is, a judgment which can be made the basis for an assertion of title adverse to his heirs or legal representatives—would seem to be a holding requiring the sanction of a statute more or less explicit in its terms. There is no statute in this state which in terms or by implication sanctions the rendition of a judgment against one deceased. The

Civil Code, section 40 (Gen. Stats. 1897, c. 102, sec. 40; Gen. Stats. 1899, sec. 4284), reads as follows: "An action does not abate by the death or other disability of a party, or by the transfer of any interest therein, during its pendency, if the cause of action survive or continue. In case of the death or other disability of a party, the court may allow the action to continue by or against his representative or successor in interest."

This statute, however, is no authority for the rendition of a judgment against a dead man. It simply provides that in the case of a cause of action which may survive to the party plaintiff or against the party defendant, the death of either of such parties shall not abate the action; that is, the action shall not be stricken from the docket. The proceedings so far conducted shall not go for naught, but may be continued ³⁴⁹ in the name of or against properly substituted plaintiffs or defendants. The statute means that the progress of a case, though arrested at the point at which death intervenes, nevertheless thenceforward may be conducted by those upon whom the right of action devolves, or against those upon whom the liability descends. This statute, however, does not assume to validate proceedings conducted in the name of or against deceased persons. It simply provides that if parties die the proceedings begun may be thereafter conducted in the name of or against their successors in interest. The common law has been nowise changed, therefore, by statute in this state. The common law, as we believe, gave no sanction whatever to judgments against dead persons, even though such persons had been in their lifetime subject to the jurisdiction of the court by complaint duly filed and process duly served. As remarked by the supreme court of Mississippi, in *Gerault v. Anderson*, Walk. 30, 12 Am. Dec. 521: "To say that the court had jurisdiction over the dead would contradict every principle of law and rule of proceeding. Why, in chancery, on the death of a party and the transmission of his interests to another, is a bill of review required? Why is a suit said to abate on the death of either party? The answer is, that on the death of the party his interest ceases, and the jurisdiction of the court ceases also. In courts of justice there must be actor, reus, and judex, before the court can act effectually to bind the parties."

Nor do the statutory provisions for the revivor of judgments bear upon the question. By statute judgments may be revived, but that means that judgments which have been rendered against living persons may be revived after the death of such

persons, not that judgments rendered against dead persons as though ³⁵⁰ they were living may be revived. As remarked by the supreme court of Tennessee, in *Carter v. Carriger*, 3 Yerg. 411, 24 Am. Dec. 585: "The object of all law is the living man, not the dead body. The defendants in error's case is not helped by a scire facias; its object is to enforce against the administrators a lien previously established against and fixed upon their intestate. When there is no such lien, the scire facias is powerless; its action is not original, but consecutive and successive—wholly dependent upon the liability created against the living man. Without this foundation the scire facias against the administrator is only an inoperative and empty form, without substance and without effect."

The principle of the question for decision has been already considered by this court in *Halsey v. Van Vliet*, 27 Kan. 474. The facts of that case were that a judgment for money was recovered against a defendant who subsequently to its rendition died intestate. Before a revivor of the judgment was had an execution was issued. After revivor, and less than five years therefrom, another execution was issued. This execution, however, was not issued within five years from the date of the judgment, nor within five years from the date of the preceding execution. The validity of a sale of land made upon the execution last issued was drawn in controversy. It was held by a majority of the court that the first execution having been issued after the death of the judgment debtor and before the revivor, and while there was no defendant in being against whom or against whose property the process could run, such execution was null and void, and its issuance could not have the effect to keep the judgment from becoming dormant intermediate the death of the debtor and the issuance of the execution on the ³⁵¹ revived judgment. The reason for the decision, of course, was that judicial proceedings against a dead man or against his property are nullities. If the issuance of an execution against the property of a deceased debtor on a judgment rendered against him in his lifetime is a nullity, a fortiori would a judgment rendered against a dead man be a nullity.

In the case of *County of Rice v. Lawrence*, 29 Kan. 158, a judgment against a convict in a case commenced against him before conviction was vacated upon direct proceedings instituted for the purpose. It was unnecessary in that case to determine whether the judgment was void in the sense of being subject to collateral attack, but it was characterized as a "nullity," and

the trend of the opinion by Mr. Chief Justice Horton seemingly carried to the point of its utter invalidity upon collateral attack.

Upon reason, and upon the authority of many adjudged cases, we are constrained to hold that the judgment of the court below was erroneous and should be reversed. Such reversal is therefore ordered, with directions to proceed in accordance with this opinion.

JUDGMENT—DEATH OF PARTY.—Where a court has obtained jurisdiction of the parties, and the subject matter during their lifetime, a judgment rendered for or against one of them after his death, though erroneous and liable to be set aside on direct proceedings, is not void nor subject to collateral attack: See the monographic notes to *Watt v. Brookover*, 29 Am. St. Rep. 816-819; *Furman v. Furman*, 60 Am. St. Rep. 655, 656.

RAIN v. YOUNG.

[61 Kansas, 428.]

JUDICIAL SALES—DORMANT JUDGMENT—ALIAS EXECUTION.—Failure to revive a judgment after execution has been levied on the property of the judgment debtor, an appraisement made, and the property advertised for sale in his lifetime does not render void a sale made under an alias execution issued after his death. Such sale is valid, and the alias execution performs the office of a writ of venditioni exponas at common law.

Quinton & Quinton, for the plaintiff in error.

Waters & Waters, for the defendant in error.

⁴²⁹ SMITH, J. The question to be determined is, whether a failure to revive the judgment against J. N. Young after an execution had been levied on his property, and appraisement made, and the land advertised for sale, in his lifetime, rendered void a sale made under another execution issued after his death. The validity of such sale must be upheld. Section ⁴³⁰ 454 of chapter 95 of the General Statutes of 1897 (Gen. Stats. 1899, sec. 4709) reads: "All real estate not bound by the lien of the judgment, as well as goods and chattels of the debtor, shall be bound from the time they shall be seized in execution." Section 468 of the same chapter provides (Gen. Stats. 1899, sec. 4724): "If lands or tenements levied on as aforesaid are not sold upon one execution, other executions may be issued to sell the property so levied upon."

The lien of the execution, of date July 20, 1880, levied on the real estate in the lifetime of Young, the judgment debtor, was not divested by the injunction proceedings or by his death. The land was "seized in execution" and was bound for the payment of the amount of the judgment from that time. At the date of the levy Young was living. If Young had not died, and all proceedings after the levy, appraisement, and advertisement for sale had been stayed, as they were, by the injunction suit, an alias execution issued after the impediment to the sale interposed by the injunction had been removed would authorize the sheriff to proceed and complete the work begun, commencing at the place where it was interrupted. No new appraisement was necessary: *Capital Bank v. Huntton*, 35 Kan. 577.

An execution issued in the lifetime of a judgment debtor and a levy made thereunder, being an entire thing, cannot be superseded after proceedings thereunder have been begun in obedience to the command of the writ. The last execution, under which the property was sold, is, by the provisions of our statute, to be given the same effect as a common-law writ of *venditioni exponas*, which was a process in continuation and completion of a previous execution by which the property had been appropriated and placed in the ⁴³¹ custody of the law. "It is not a separate, independent, much less an original, proceeding, the offspring or result of a distinct and further adjudication": *Taylor v. Doe*, 13 How. 287, 293. The case cited is a pertinent authority. A writ of *fiery facias* was issued on a judgment, returnable in June, 1841. April 16, 1841, it was levied on the land of Crane. Two-thirds the value of the property not being bid, the writ was returned. February 20, 1842, Crane died. May 30, 1842, a writ of *venditioni exponas* was issued commanding the sheriff to sell the land, which he did. It was held that the death of the judgment debtor did not render the sale void. To the same effect, see *Holman v. Holman*, 66 Barb. 215; *Doe v. Heath*, 7 Blackf. 154; *Barber v. Peay*, 31 Ark. 392.

In *Bigelow v. Renker*, 25 Ohio St. 542, real estate was levied on in the lifetime of the judgment debtor and sold after his death without first making his representatives parties to the judgment. The court said: "The lands in controversy had been duly taken in execution and appraised as the property of Perry, the judgment debtor, in his lifetime, but were sold under a *venditioni exponas* issued after his death. . . . Execution was

pending. The venditioni exponas was the mere complement of the fieri facias. Together they completed the process of execution. The heir succeeded to an estate in the custody of the law, and took it subject to the process of execution already in operation."

The last execution, under which the sale was made, related in its operation back to the levy under the prior one. It recited that a former execution had been levied on the land and the property advertised for sale, and that further proceedings thereunder had ⁴⁸² been enjoined, and its directions were confined to an order to sell under the levy theretofore made. The purpose was to complete the proceedings begun under the former writ. It followed the form of a writ of venditioni exponas at common law, the nature of which is thus defined: "The venditioni exponas is sometimes spoken of as a branch of the writ of fieri facias. It is issued when an original, alias or pluries writ of fieri facias is returned with an indorsement, showing that the officer has levied on property and has the same in his hands unsold. . . . This writ is, therefore, properly defined as the writ which compels an officer to proceed with the sale of property levied upon under a fieri facias": Freeman on Executions, 2d ed., sec. 57.

In *Ritchie v. Higginbotham*, 26 Kan. 645, an execution was levied and returned.. An alias was then issued in the usual form, making no reference to the prior execution, in which the sheriff was commanded to levy the same, etc. It was held that while the alias writ was not in the form of a venditioni exponas, it performed the same office, and a legal sale could be made under it. In *Green v. McMurtry*, 20 Kan. 189, the right to proceed in the manner adopted in the case at bar is recognized. The sheriff's deed conveyed all the title of the execution debtor.

The judgment of the district court will be reversed and a new trial ordered.

AN ALIAS EXECUTION issued after the death of the defendant is regular, where the original was issued during the lifetime of the defendant, and the alias issues during the term in which the original was returned: *Collingsworth v. Horn*, 4 Stew. & P. 237, 24 Am. Dec. 753.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY v. CAMPBELL.

[61 Kansas, 439.]

CONSTITUTIONAL LAW—RAILROADS—FREE TRANSPORTATION TO SHIPPERS.—A statute requiring railroad companies to furnish free transportation to shippers of livestock in certain cases without any obligation on the part of the shipper to pay or perform anything as an equivalent for his transportation is unconstitutional and void, as a deprivation of property without due process of law, and a denial of the equal protection of the laws.

A. A. Hurd, W. Littlefield, and O. J. Wood, for the plaintiff in error.

Sankey & Campbell, for the defendant in error.

⁴³⁹ **DOSTER, C. J.** This was an action brought by the defendant in error, as plaintiff, against the plaintiff ⁴⁴⁰ in error, as defendant, to recover an amount of money paid as passenger fare on the line of the road of plaintiff in error from Kansas City, Kansas, to Attica, Kansas. The defendant in error shipped a carload of livestock from the latter place to the former. On the going trip he rode free on a stock-shipper's contract issued to him by the railroad company's agent at the shipping point. On the return trip he demanded to be carried free, in accordance with the provisions of chapter 167 of the Laws of 1897: Gen. Stats., c. 70, secs. 67-79; Gen. Stats. 1899, secs. 5763-5765. This demand was refused, and to avoid ejection from the train he paid the required fare. He then brought an action to recover the amount paid, together with an attorney's fee for the prosecution of the suit. Judgment was rendered in his favor, first by a justice of the peace, next by the district court, and lastly by the court of appeals: *Atchison etc. Ry. Co. v. Campbell*, 8 Kan. App. 661. The railway company has prosecuted error to this court.

The sole question involved in the case is the constitutionality of the legislative enactment under which the demand for free transportation was made. The title of the act and its first two sections, the only ones material to quote, read as follows:

"An act to amend chapter 195 of the Laws of 1895, being an act entitled 'An act to require railroad companies to furnish free transportation to shippers of stock in certain cases, and providing a remedy in case of failure or refusal on the

part of the railroad company to comply with the provisions of this act.' To provide a penalty for the violations of the provisions of this act, and repealing all acts and parts of acts in conflict herewith.

"Section 1. That section 1 of chapter 195 of the Laws of 1895 be amended so as to read as follows: Section 1. Whenever any railroad company, or corporation, doing business within the limits of this state shall receive and ship any livestock by the carload, said company, in consideration of the usual price paid ⁴⁴¹ for the shipment of said car, shall pass the shipper or his employé to and from the point designated in the contract or bill of lading, without further expense to the shipper in the way of fare; provided, however, that in all cases where a shipper ships more than one carload of stock at the same time the said railroad company shall be and is hereby required to pass free, as aforesaid, only one additional person, shipper, or employé, for every three carloads shipped in addition to the first carload.

"Sec. 2. That section 2 of said chapter 195 of the Laws of 1895 is hereby amended so as to read: Sec. 2. Every railroad company, or corporation failing or refusing to comply with the provisions of section 1 of this act shall be liable in damages to the shipper, for the amount of damages sustained by reason of such failure or refusal on the part of the railroad company, to be recovered before any court of competent jurisdiction, and any judgment recovered on any such action shall be made to cover reasonable attorney's fees for plaintiff's attorney."

The above act is assailed upon the ground of its repugnancy to that portion of the fourteenth amendment to the constitution of the United States which reads: "Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Speaking for myself, I am of the opinion that a strained and artificial construction has been often placed upon this constitutional provision, especially by the federal courts, for the purpose of bringing within its prohibitive terms much wholesome state legislation. For instance, I do not believe that the word "person" used in the clause above quoted was designed to include corporations, nor that it can in reason bear that signification when read in connection with the preceding clauses of the section and interpreted in the historic light of the ⁴⁴² origin and purpose of the amendment. However, the federal courts, the authoritative expositors of the federal constitution, departing from the view first taken by

them, have been for many years holding that a corporation was a "person" within the meaning of the provision above quoted. Those decisions are, of course, binding upon the state courts. Being, therefore, under the compulsion of the now settled rule of interpretation, I agree with my associates that the above-quoted enactment cannot be upheld. It operates as a deprivation of property without due process of law, and is a denial of the equal protection of the laws.

The property of a railroad company consists not alone in its franchise to be a corporation, nor its right of way and track, nor its rolling stock and other tangible property, but it consists, in its most essential character and important sense, in the right to charge and collect tolls for the transportation of persons and property over its line. Without the right to take tolls such corporation could not do business, and a denial of its right to take tolls would as effectually render valueless all of its other property as a confiscation of its other property would defeat its ability to carry on its business. Upon the conception of the right to take tolls as a species of property belonging to railroad corporations rest all the decisions of all the courts, both state and federal, denying the right of state legislatures to restrict such tolls below a reasonable amount. It needs but a glance at the act in question and but a moment's thought over the consequences to result from a sanction of its provisions to perceive that it strikes vitally at the fundamental right of a railroad company to own and enjoy that species of property which exists in the form of its franchise to charge and ⁴⁴³ collect tolls. It purports in its title to be and is "An act to require railroad companies to furnish free transportation to shippers of stock in certain cases"; and in its body it requires railroad companies, "in consideration of the usual price paid for the shipment of a car of stock, to pass the shipper or his employé to and from the point designated in the contract or bill of lading, without further expense to the shipper in the way of fare."

Upon no theory whatever, consistent with the idea that the franchise of railroad companies to take tolls is a species of property, or consistent with the adjudications of the courts that such right of property is protected by the fourteenth amendment to the federal constitution, can such an enactment be upheld. Once grant that so much of the property of railroad companies as is involved in their right to charge passenger fare to shippers of stock can be taken away by legislative enactment,

and it necessarily follows that the like property of theirs which consists in their right to charge passenger fare to other shippers of other kinds of property can also be taken away for like reasons; and once grant, upon like considerations, that the property right of railroad companies to take tolls for passenger carriage can be thus taken away, and the right to take tolls for freight transportation can be likewise taken away; and once grant that the right to take tolls for freight and passenger carriage can be taken away, and it follows that the right to own and possess the rolling stock and other like property necessary to the operation of the road can be likewise taken away; in short, there would be no end to the extension of legislative authority over the right of railroad companies to own and enjoy property. It would be no answer to say that the enforcement of the ⁴⁴⁴ act in question would not sufficiently impair the property right of the companies to take tolls as to be substantially detrimental to their interests. Rights are not measured or ascertained by the extent of the injury resulting from their impairment or denial. They do not cease to exist merely because the hurt to them may be slight. Rights reside in principles and not in the physical ability of the claimant of rights to do without a minor portion of them.

Again, speaking for myself, I am a firm believer in the right of the legislature of this state, under the reserved power of the constitution, article 12, section 1, to amend or add to the original acts providing for the incorporation of companies, and to amend or add to the original body of laws governing them, without declaring its enactments to be amendatory in character. However, its power of amendment in such cases is limited to such enactments as do not substantially impair the vested rights of the corporation: 7 Am. & Eng. Ency. of Law, 2d ed., 675. I therefore agree with my associates that the act in question, even if it be regarded as an exercise of the reserved power of the legislature to amend the charter of railroad corporations, is a substantial impairment of their vested rights.

We do not mean to say that the legislature is powerless to declare circumstances or prescribe conditions under which railroad companies may be required to furnish transportation to shippers of livestock or other merchandise over their lines. However, those circumstances or conditions, if declared or prescribed, must exist in the form of considerations or equivalents for the transportation furnished. It may be that railroad companies can be compelled to carry patrons of their lines for some

other consideration than cash ⁴⁴³ fares. To illustrate—but only to illustrate, not to decide—it may be that a legislative enactment which imposed upon shippers of livestock the obligation to care for their stock en route, and to that extent to relieve the trainmen of the burden of its care, and which required the company to transport the shipper free as an equivalent for his relief of the train employes in the way stated, would be constitutionally valid—would not be a taking of private property without compensation. But the enactment in question does not provide for the equivalent of labor performed for transportation furnished. It declares that the transportation shall be furnished “in consideration of the usual price paid for the shipment of said car.” What the railroad company is required to do is not required of it as a compensation for anything to be done for it by the shipper, but is required of it in the form of a gratuity over and above the usual and ordinary charges for transportation. The enactment is not framed upon the assumption that the usual price paid for the shipment of livestock is excessive to the extent of the passenger carriage of the shipper to and from the place of shipment, and that in order to make good the excess the shipper shall be transported free, but it is framed upon the assumption that the charge for the transportation of the car of stock is a reasonable one.

The brief of counsel for defendant in error suggests the importance of the shipper's accompanying his stock in order to care for it en route. We do not judicially know that it is important or advantageous to the shipper or to the company for the former to accompany his stock to market, nor does the act assume the importance or advantage either to the shipper or the company in the former's accompanying the stock. It imposes on him no such requirement. So far as the ⁴⁴⁶ act is concerned, he may accompany his stock or he may ride on another train. There is nothing whatever in the act from which an idea of obligation on the part of the shipper to pay or perform anything as an equivalent for his transportation can be derived. However, turning to the shipping contract made by the defendant in error, we perceive in it certain stipulations imposing on him the obligation to accompany and care for his stock, but this contract is no part of the statute in question. The statute does not purport to be framed upon the assumption that such contracts are or will be entered into between railroad companies and shippers of livestock. The contract is apart from the statute. None of its provisions is included within the terms of the

statute. In short, there is no theory upon which this act can be upheld, and, therefore, we are constrained to hold it to be unconstitutional and void.

No cases of a like character have been brought to our attention except that of *Lake Shore Ry. Co. v. Smith*, 173 U. S. 684. That case involved the validity of an act of the legislature of Michigan requiring railroad companies to keep for sale one thousand mile tickets, at specified rates less than the regular rates, to be issued in the name of the purchaser and the members of his family, and to be good for use for two years from the date of sale. Commenting on this enactment the court said: "If the legislature can interfere by directing the sale of tickets at less than the generally established rate, it can compel the company to carry certain persons or classes free. If the maximum rates are too high in the judgment of the legislature, it may lower them, provided it does not make them unreasonably low as that term is understood in the law; but it cannot enact a law making maximum rates and then proceed ⁴⁴⁷ to make exceptions to it in favor of such persons or classes as in the legislative judgment or caprice may seem proper. What right has the legislature to take from the company the compensation it would otherwise receive for the use of its property in transporting an individual or classes of persons over its road, and compel it to transport them free or for a less sum than is provided for by the general law? Does not such an act, if enforced, take the property of the company without due process of law? We are convinced that the legislature cannot thus interfere with the conduct of the affairs of corporations."

The judgments of the court of appeals and of the district court are reversed, and the latter court is directed to enter judgment for the defendant below.

CORPORATIONS—HOSTILE LEGISLATION.—On the protection of corporations from special and hostile legislation, see the monographic note to *St. Louis etc. Ry. Co. v. Paul*, 62 Am. St. Rep. 165-182.

DROVERS' PASSES are discussed in the monographic note to *Illinois Cent. R. R. Co. v. O'Keefe*, 61 Am. St. Rep. 89, 90.

LOVE v. BLAUW.

[61 Kansas, 496.]

CONVEYANCE, WHETHER DEED OR WILL.—A written instrument in form of a deed conveying a present interest in land to the children of the grantor, but attempting to postpone their enjoyment of the estate until after his death, and subsequently treated by the parties as a deed, must be construed as such, and not as an instrument testamentary in character.

PARTITION—LIFE TENANT AND REMAINDERMEN.—A life tenant of lands cannot maintain an action for partition against the remaindermen, and a judgment in such case setting part of the land over to the life tenant in fee is absolutely void, and subject to collateral attack.

Claim of land under a decree in a partition suit. Under the deed mentioned in the opinion Catherine Blauw, together with her husband, granted certain land to her children. The deed contained the following provision: "The estate in said lands and tenements not to vest in said named grantees and their heirs until the death of said Catherine Blauw, she reserving in herself a life estate therein. To have and to hold unto the said named grantees and their heirs from and after the death of the said Catherine Blauw and their heirs and assigns forever." The plaintiff in error, Anna M. Love, claims under the children of Mrs. Blauw, by conveyance from them.

J. P. Hindman, for the plaintiff in error.

J. W. Jenkins and C. P. Craig, for the defendant in error.

500 SMITH, J. The deed from Catherine Blauw to her minor children is attacked by the defendant in error 501 as testamentary in character and not valid as a conveyance. The question is difficult to settle, in view of opposing authority: Devlin on Deeds, 2d ed., secs. 855a-855c. There is a tendency, however, in the modern decisions to uphold conveyances when not clearly repugnant to some well-defined rule of law: Abbott v. Holway, 72 Me. 298; Dismukes v. Parrott, 56 Ga. 513. We are inclined to hold that the better interpretation of the instrument under consideration is to construe it as presently passing an estate in remainder to the grantees, reserving a life estate to the grantor, Mrs. Blauw: Graves v. Atwood, 52 Conn. 512, 52 Am. Rep. 610. By the terms of the deed a present interest was conveyed to the children of Mrs. Blauw, but their enjoyment of the estate was postponed until after her death. The intention of the parties also is to be considered. Mrs. Blauw

regarded it as a conveyance, which fact was attested by the partition suit brought by her, in which she treated the instrument as a deed, and the grantees coincided also in her construction of it. If the instrument is not given effect as a deed, it fails of any purpose, for it is not so witnessed as to be valid as a will.

The second question relates to the validity of the partition proceedings brought by Catherine Blauw against her children for a division of the estate. If such proceedings were authorized by law, or were merely voidable, they must be sustained so far as their effect is involved in this case. We are well convinced, however, that the proceedings were void, in that the court, under the pleadings in the cause, could not take jurisdiction of the subject matter of the partition suit. In her petition for a division of the property she avers that she is the owner of a life estate in the lands; that she and her husband executed a deed ⁵⁰² to her children for the same, reserving to herself a life estate; that the interest of each of said minors defendant is the equal undivided one-third thereof, subject to her life estate therein. The prayer of her petition was: "That so much of said land as will be found by appraisement to be of the value of the life estate of plaintiff be set apart to plaintiff in kind unless it should be found to be injurious to the interest of the parties, in which event that so much land as will yield the value of her life estate be sold and the proceeds paid to her in money. That the remaining portion of said land be equally divided between said defendants."

The defendants in that action answered by general denial, filed by their guardian ad litem. To confer jurisdiction upon a court for the partition of an estate, it is indispensable that cotenancy exist between the parties. In a case where the same building covered ground owned by both parties to the action, the supreme court of Illinois used this language: "We are satisfied neither a court of law nor equity has jurisdiction over the case as presented by these pleadings, and accord with appellee in the proposition that no power exists to compel the fusion of these estates, to be followed by a sale and finally by a distribution of the proceeds. The idea of the plaintiff in error that he and the defendant in error hold this property jointly is not supported by the title deeds. They are neither joint tenants, tenants in common, nor coparceners, but they severally, each for himself, own distinct parts and portions of the premises, the character of which a court of chancery has no power to change":

McConnell v. Kibbe, 43 Ill. 18. See, also, Johnson v. Moser, 72 Iowa, 523.

In the case of Smith v. Runnels, 97 Iowa, 55, the plaintiff was the owner of a life estate ⁵⁰³ in real property acquired under a will. She brought an action of partition, alleging that the defendants (some thirty-two in number) were collateral heirs to the property, entitled to what remained in the real estate after plaintiff's life estate had terminated. The court said: "Plaintiff having but a life estate in the land, the next question presented is, What authority has a court of equity to order its sale? It is evident that these parties are not joint owners or tenants in common of the same real estate, and it is equally clear that, under our statute, partition can be had only when the land is so owned. As said in the case of Johnson v. Moser, 72 Iowa, 523: 'There is no necessity to have, nor, in the nature of things, can there be, partition of real estate owned in severalty': See, also, Clark v. Richardson, 32 Iowa, 399; Freeman on Cotenancy, sec. 431. Under the will, plaintiff has the sole use and benefit of the land during her natural life. The defendants have no right to its possession or use until the death of the plaintiff. Whether the plaintiff may make a voluntary disposition of her life estate is a question we need not determine; for if she has this right, she needs no decree of a court of chancery to assist her in the exercise of the power": See, also, Seibel v. Rapp, 85 Va. 28.

In Stansbury v. Inglehart, 19 Wash. L. Rep. 594, it was held that a court of equity not only could not assume jurisdiction to decree partition of land between one having a life estate and the remainderman, but that the consent of the remainderman, where he is an infant, or his ratification could not give validity to such a decree.

It will be noticed that the district court in this case divested the minors of a large portion of an estate which they owned in fee simple, subject only to the life estate of their mother, and gave it to the latter ⁵⁰⁴ absolutely, in fee, and without condition. The court made a finding that the infants were owners in fee simple, and that Catherine Blauw had simply a life estate, and just how the court proceeded to convert this life estate into a greater one we do not understand. We cannot treat the judgment in that case as voidable merely and not subject to collateral attack. We regard it as absolutely void. Having a life interest only, and claiming no greater estate in her petition, we think the court was powerless to adjudicate that

she take the fee. She had no such community of interest with her children as to authorize partition.

The judgment of the court of appeals will be reversed and the judgment of the district court affirmed.

CONVEYANCE, WHETHER DEED OR WILL.—An instrument in form a deed, which conveys an interest in praesenti, though to be enjoyed in possession in futuro, is operative as a deed and not as a will: See the monographic note to *Wilson v. Carrico*, 49 Am. St. Rep. 220.

PARTITION.—A TENANT FOR LIFE is not entitled to maintain partition against reversioners, remaindermen, or others having a future conditional interest: See the monographic note to *Aydlett v. Pendleton*, 32 Am. St. Rep. 778; *Deshong v. Deshong*, 186 Pa. St. 227, 65 Am. St. Rep. 855.

CLARK v. SKEEN.

[61 Kansas, 526.]

NEGOTIABLE INSTRUMENTS—STIPULATION NOT AFFECTING NEGOTIABILITY.—A note for the payment of a sum certain, at a fixed date, is negotiable, although it stipulates that upon default in the payment of interest the whole amount should become due at the option of the holder and then draw a greater rate of interest.

NEGOTIABLE INSTRUMENTS—STIPULATION NOT AFFECTING NEGOTIABILITY—EXCHANGE.—A note for the payment of a sum certain, with current exchange on a place other than the place of payment, is negotiable.

NEGOTIABLE INSTRUMENTS—PRESUMPTION FROM POSSESSION.—BURDEN OF PROOF.—Possession of a negotiable note properly indorsed is prima facie evidence that the holder is the owner thereof, that he acquired it in good faith and for value in the usual course of business before maturity, without notice of any circumstances impeaching its validity. The burden of proof is on the drawer of the note to show to the contrary.

Action to recover upon the following note: "Five years after date, for value received, we promise to pay to the order of the Jarvis-Conklin Mortgage Trust Company, at its office in Kansas City, Missouri, three thousand (\$3,000) dollars, lawful money of the United States, with interest thereon at the rate of six per cent per annum, payable semi-annually on the first days of January and July, in each year, according to the tenor and effect of the interest notes of even date herewith and hereto attached. Both principal and interest payable with New York exchange. This note is to draw interest from date at the rate

of twelve per cent per annum if either principal or interest remain unpaid ten days after date. At the option of the holder after any of said interest notes remain due and unpaid ten days, the whole of the principal and interest may be declared immediately due and payable. This note is given for an actual loan of the above amount, and is secured by a mortgage deed of even date herewith, which is the first lien on the property therein described." Judgment for the defendants, and plaintiff appeals.

Beardsley & Gregory, for the plaintiff in error.

W. W. S. Snoddy and E. C. Wilcox, for the defendants in error.

527 JOHNSTON, J. In the course of the trial the district court, in ruling on the testimony and instructing the jury, held that the note copied in the foregoing statement is not a negotiable instrument, and the determination of this question will dispose of, or render unimportant, a number of other questions discussed by plaintiff in error. The negotiability of the paper appears to have been challenged on two grounds, and 528 the first is that it contains a stipulation that upon default in the payment of interest the whole amount shall become due and then draw a greater rate of interest. Stipulations like these are not inconsistent with negotiability. According to mercantile law, negotiable paper is required to be certain as to time and amount, but the note in question, as will be observed, fixes a certain time for payment, and the fact that it may become due at an earlier time depends upon the maker himself. Stipulations somewhat similar were contained in the notes and mortgages under consideration in *Holden v. Clark*, 16 Kan. 346, and yet it was held that the paper was negotiable, and that an innocent and bona fide purchaser took the same freed from the equities existing between the original parties.

In *Carlon v. Kenealy*, 12 Mees. & W. 139, it was held that a note payable in installments, subject to a condition that upon default being made in the payment of the first installment the greater amount should become due, is negotiable, and in deciding the case it was said that "almost every note payable in installments has such a condition. It is not a contingency. It depends upon the act of the maker himself, and on his default it becomes a promissory note for the whole amount." In *Dobbins v. Oberman*, 17 Neb. 163, the note contained a provision that it should be due at a stated time, and might become

due earlier, on the happening of a certain event. The instrument was held negotiable, and in deciding it the court stated: "It matters not, then, that it also contained a promise to pay sooner than the general date of payment, upon the happening of an uncertain event." In *Wilson v. Campbell*, 110 Mich. 580, it was held that a note for the payment of a certain sum at a fixed date is not ⁵²⁹ rendered non-negotiable by a provision that it may become due sooner, at the option of the holder, on default in the payment of interest, nor by the fact that a mortgage securing it contains a similar provision in regard to a default in the payment of taxes.

The same question was before the supreme court of the United States in *Chicago Ry. etc. Co. v. Merchants' Bank*, 136 U. S. 269, where it was held that a recital that the note in suit was one of a series, and that in default of payment of any one of the series the note in suit should become due, did not render the note non-negotiable, the same containing a promise to pay at a certain definite date, at which it became due at all events: See, also, *De Hass v. Roberts*, 59 Fed. Rep. 853; *National Bank of Battle Creek v. Dean*, 86 Iowa, 656; *Walker v. Woollen*, 54 Ind. 164, 23 Am. Rep. 639; *Cota v. Buck*, 7 Met. 588; *Ernst v. Steckman*, 74 Pa. St. 13, 15 Am. Rep. 542; *Markey v. Corey*, 108 Mich. 185, 62 Am. St. Rep. 698; *Randolph on Commercial Paper*, sec. 114; *Daniel on Negotiable Instruments*, 4th ed., sec. 48.

The fact that it was to draw a greater rate of interest after default does not destroy the negotiable quality of the paper. In *Parker v. Plymell*, 23 Kan. 402, the note contained a promise to pay interest after maturity, but stipulated that if the note was not paid at maturity the same should bear interest at twelve per cent from date, and it was held that this provision did not render the note non-negotiable. *Gilmore v. Hirst*, 56 Kan. 626, was a case where the note contained a stipulation that if the interest was not paid when due it should become principal and draw eight per cent interest, and it was held that the stipulation for the payment of interest on interest did not render the note non-negotiable: See, ⁵³⁰ also, *De Hass v. Roberts*, 59 Fed. Rep. 853; *Hope v. Barker*, 112 Mo. 338, 34 Am. St. Rep. 387.

The second ground of attack upon the negotiability of the note is that it was made payable with New York exchange. There is considerable division of judicial opinion as to the effect of such a stipulation, but we are better satisfied with those authorities holding that it is not destructive of negotiability.

It is a general rule that one of the essential qualities of commercial paper is that the amount to be paid must be fixed and certain, and the reason for this rule is that parties to such paper may know the amount necessary to discharge it. The spirit of the rule requiring precision, however, applies rather to the principal amount than to incidental additions of interest or exchange. In *Seaton v. Scovill*, 18 Kan. 433, 26 Am. Rep. 779, this court held that a note otherwise negotiable was not rendered non-negotiable by a stipulation to pay costs of collection, including reasonable attorneys' fees. Although that stipulation is not analogous to the one we are considering, some of the courts place it on the same footing with a provision for the payment of exchange, and hold that both of them introduce such an element of uncertainty as to deprive the instrument of the negotiable attribute. In discussing the effect of such a stipulation, Daniel, in his work on Negotiable Instruments, fourth edition, section 54a, says: "Instruments payable with exchange have been generally treated as commercial instruments by the business world and the courts; that a fair construction of the statute of Anne, upon which many of the modern statutes are modeled, and which has been deemed by some of the courts only declaratory of the common law, does not necessarily impeach as a note an instrument so payable; and that the spirit of the rule requiring precision in the amount of negotiable instruments ⁵⁸¹ applies rather to principal amount than to the ancillary and incidental additions of interest or exchange."

The current rate of exchange between two places at a particular time may be said to be a matter of common knowledge, or at least easily ascertainable by anyone. However, the exchange may be treated as incidental to the principal amount, and as the means of transmitting the amount due to the payee. In *Bullock v. Taylor*, 39 Mich. 137, 33 Am. Rep. 356, Judge Cooley, in discussing the matter of the payment of exchange or express, said: "By the agreement as well as by the terms of the notes, they were made payable at East Saginaw, and it therefore became the duty of the promisors to be at any expense necessary in the transmission of the money to that place. Whether they sent by draft or by express the expense would equally fall upon them, and an express promise to pay it could add nothing to their liability."

In *Morgan v. Edwards*, 53 Wis. 609, 40 Am. Rep. 781, it was said: "A note is payable in lawful money of the United States which is at par in every portion of the country. If a note is

made payable in Milwaukee, with exchange on New York, it requires precisely the same sum of money to pay it as would be required had it been made payable in New York. The exchange is the cost of drawing a bill and transmitting the money to New York to meet it. In *Leggett v. Jones*, 10 Wis. 34, the note was payable at the Dodge County Bank, with exchange on New York. Had the note been payable in New York, no one would claim that there was any uncertainty in the amount, although the maker would necessarily have been subjected to the expense, uncertain in amount, of providing funds there to meet it. It is precisely that expense which constitutes and governs the cost of exchange. Hence, the same sum ⁵³² of money which would have been required to pay the note in New York would have paid it at the Dodge County Bank, including the exchange, according to its terms. . . . Hence it may well be said that the uncertainty in the amount due on a note which stipulates for the payment of exchange between two points is rather apparent than real and substantial": See, also, *Smith v. Kendall*, 9 Mich. 242, 80 Am. Dec. 83; *Johnson v. Frisbie*, 15 Mich. 286; *Bradley v. Lill*, 4 Biss. 473; Fed. Cas. No. 1783; *Hastings v. Thompson*, 54 Minn. 184, 40 Am. St. Rep. 315; *Hill v. Todd*, 29 Ill. 101; *Whittle v. Fon du Lac Nat. Bank* (Tex. Civ. App., June 20, 1894), 26 S. W. Rep. 1106; *Orr v. Hopkins*, 3 N. Mex. 25 (45), 183; *Leggett v. Jones*, 10 Wis. 35.

In *Randolph on Commercial Paper*, section 200, in speaking of the provision for exchange, it is said that "such a provision is valid if it is not used as a subterfuge to evade the usury laws": See, also, *Tiedeman on Commercial Paper*, sec. 28a; *Daniel on Negotiable Instruments*, sec. 54.

Our conclusion is that the note in question is negotiable, and in answer to some of the points raised in the case, it may be said that the possession of such a note properly indorsed is prima facie evidence that the holder is the owner thereof; that he acquired it in good faith for value, in the usual course of business, before maturity, and without notice of any circumstance that would impeach its validity; and where the defendant, who is the maker of the note, claims that the plaintiff does not so hold it, the burden is upon him to prove his claim: *Mann v. Second Nat. Bank*, 21 Kan. 746; *First Nat. Bank v. Emmitt*, 53 Kan. 603; 4 Am. & Eng. Ency. of Law, 2d ed., 318.

There is some criticism of other instructions, but as the note is held to be negotiable the questions are not ⁵³³ likely to arise

upon another trial; and the same is true as to rulings upon the testimony.

The judgment will be reversed and the cause remanded for a new trial.

PROMISSORY NOTES—NEGOTIABILITY.—A provision in a note that upon a certain contingency the holder shall have the option to declare it due before the date fixed for its maturity does not destroy its negotiability: *Hunter v. Clarke*, 184 Ill. 158, 75 Am. St. Rep. 160; neither does a provision therein for a specified additional rate of interest after maturity: *Merrill v. Hurley*, 6 S. Dak. 592, 55 Am. St. Rep. 859. And a stipulation for the payment of the current rate of exchange on a place other than the place of payment, inserted in a note for a certain sum of money, does not render it non-negotiable: *Hastings v. Thompson*, 54 Minn. 184, 40 Am. St. Rep. 315.

NEGOTIABLE INSTRUMENTS—BONA FIDE HOLDER.—The law looks with favor upon the holder of negotiable paper and requires very cogent evidence to convict him of bad faith: *New Orleans etc. Co. v. Templeton*, 20 La. Ann. 141, 96 Am. Dec. 385. When a note is transferred before maturity, the presumption is that the transferee takes in good faith: *Borgess Investment Co. v. Vette*, 142 Mo. 560, 64 Am. St. Rep. 567.

SCHUCHART v. SCHUCHART.

[61 Kansas, 597.]

MARRIAGE AND DIVORCE—COMMON-LAW MARRIAGE. If a man and woman are formally married while one of them is under a disability, and, after the removal of such disability, they determine to, and do continue to, live together in good faith as husband and wife without the performance of another marriage ceremony, such cohabitation constitutes a common-law marriage, and makes them legally husband and wife after such disability is removed.

E. A. Berry and Gregg & Gregg, for the plaintiff in error.

W. W. Redmond and C. Smith, for the defendant in error.

598 **JOHNSTON, J.** The controversy in this case arises over the title to a quarter section of land in Washington county claimed by Thomas Schuchart, as the son and only heir of Jacob Schuchart, who died in December, 1896, while the defendant claims the property on the ground that she was the lawful wife, and is now the widow, of Jacob Schuchart, deceased. The decision of the case turns on the point whether Agnes was the wife of Jacob at the death of the latter, and

this question was determined in the affirmative by the jury in the trial court. There is no dispute but that Jacob was married early in life to the mother of the plaintiff, but it appears that she died in 1891, leaving him free to contract the marriage relation with another. He undertook to enter into the marriage relation with Agnes, who, it appears, had been formerly married to one Porteous. There had been a separation between them, and she had not heard from or of Porteous for about seventeen years prior to the time she assumed the marriage relation with Schuchart. Lest he might be still alive, she procured a divorce from Porteous on September 10, 1894, in Riley county, where she then resided. Within three months thereafter, and before the decree of divorce became operative and final, she and Jacob Schuchart procured a license to marry, and a marriage ceremony in due form was performed by the probate judge of Washington county. The parties overlooked, or were unmindful of, the statute providing that the marriage relation is not effectually ⁵⁹⁹ dissolved until the expiration of six months from the date of the decree of divorce. The attempted marriage was therefore a nullity. But the contention of the defendant is that, having learned of the limitation of the statute and of the invalidity of the marriage ceremony, they then determined to live together as husband and wife without further ceremony, and thereafter and in good faith did live for years in that relation.

Was there a consensual or common-law marriage? The jury found that there was, and the proof abundantly sustained the finding. It showed that the marital relation was honestly but illegally assumed in the first instance. Agnes was then under a disability, it is true, but, so far as the record shows, both of them were innocent of an intent to transgress the law or to commit a wrong. When they learned of the disability and that it had been removed, the matter of another ceremony was considered and discussed between them. He expressed a willingness to have a repetition of the ceremony if she desired that it should be done, but stated that he saw no necessity for it. She did not think it was necessary, and both then declared that "we are man and wife, and will continue to be man and wife"; and it appears that thereafter they cohabited and otherwise lived together as such. They publicly acknowledged each other as husband and wife, assumed marriage rights, duties, and obligations, and were generally reputed to be husband and wife in the community. The plaintiff even visited with and treated

them as occupying the marriage relation, and so regarded them, until he heard of the statutory disability which existed when the marriage ceremony was performed.

The plaintiff contends that, as the relation between ⁶⁰⁰ the parties in the first instance was illicit, the presumption is that the illicit relationship continued after the statutory disability had been removed. If they had entered into a mere meretricious relation, with an arrangement that the illicit cohabitation should be abandoned at the will of either, there would be room for a presumption that the illicit relationship continued after the removal of the disability. It is the policy of the law, however, to uphold marriage contracts, and to sustain marriage, where the parties in good faith intend to assume the marriage relation and thereafter live together as husband and wife. To establish the plaintiff's claim, he necessarily asserts the wrong of his father; that the connection was not formed with pure motives, nor entered into with the intention of creating the relation of husband and wife—was merely formed for carnal commerce. As has been said, the law presumes morality and not immorality, marriage and not concubinage, legitimacy and not bastardy: *Hynes v. McDermott*, 91 N. Y. 451, 43 Am. Rep. 677. Bishop, in treating of marriages formally entered into in good faith, where there was an impediment to the marriage, says: "If the parties desire marriage, and do what they can to render their union matrimonial, yet one of them is under a disability—as where there is a prior marriage undissolved—their cohabitation, thus matrimonially meant, will in matter of law make them husband and wife from the moment when the disability is removed": 1 Bishop on Marriage and Divorce, secs. 970, 975, 979; *Teter v. Teter*, 101 Ind. 129, 51 Am. Rep. 742; *Poole v. People*, 24 Colo. 510, 65 Am. St. Rep. 245.

The marriage in this case, as we have seen, was formally celebrated, and as every presumption of the law is in favor of matrimony, the burden is on the plaintiff to show illegality, even though it may involve ⁶⁰¹ the proving of a negative. To establish his case, the plaintiff was therefore required to prove not only that Porteous was living, but that the marriage relation of the defendant with him had not been dissolved by divorce. He did show that Porteous was still living, but failed to show that a divorce had not been granted to Porteous from her: *Boulden v. McIntire*, 119 Ind. 574, 12 Am. St. Rep. 453; *Klein v. Laudman*, 29 Mo. 259; *Hadley v. Rash*, 21 Mont. 170, 69 Am. St. Rep. 649. We need not rely on this presumption,

however, and prefer to place our decision on the ground that there was a consensual marriage. Everything in the evidence indicated purity of purpose and good faith in forming the relation, and after the impediment was removed it is manifest that there was present in the minds of the parties that mutual consent which gives validity to marriages in cases where there is no formal solemnization.

Some criticism is made upon the language employed by them to express their consent, but the surrounding circumstances and subsequent conduct of the parties leave no doubt as to the interpretation which should be placed upon their words. As held in *Renfrow v. Renfrow*, 60 Kan. 277, 72 Am. St. Rep. 350, an express agreement between the parties to take and live with each other as husband and wife is not necessary. The agreement to do so may be implied from their acts and conduct in mutually recognizing and holding each other out as bound together in the matrimonial state. The words, however, that were used, and of which testimony was given, fairly indicated a present intention to marry and to accept each other as husband and wife. This, in connection with their subsequent conduct, was clearly sufficient to establish marriage.

602 The objections to rulings upon testimony are unsubstantial, and what has been said is sufficient answer to the exceptions taken to the rulings upon instructions.

The judgment will be affirmed.

COMMON-LAW MARRIAGE.—Although a man and woman do what they can to render their union matrimonial, the marriage is void if one of them is under a disability; but if they live together as husband and wife after such disability is removed, they are husband and wife from the time of such removal: *Poole v. People*, 24 Colo. 510, 65 Am. St. Rep. 245.

TAYLOR v. BUCK.

[61 Kansas, 604.]

EXECUTIONS—AMENDMENT AFTER RETURN.—An execution authenticated by the seal of the court, but lacking the signature of the clerk who issues it, may be amended after its return by order of court upon such clerk to sign it, to validate the proceedings and sale under it.

Madden Brothers, for the plaintiff in error.

J. J. Buck and J. G. Hutchinson, for the defendants in error.

604 DOSTER, C. J. This is a proceeding in error from an order overruling a motion to vacate a sheriff's sale, **605** and from an order giving leave to amend the execution upon which the sale was made, and from an order confirming the sale upon the amended execution. The judgment on which the execution was issued was rendered December 7, 1886. Thereafter executions were issued on the dates following and returned unsatisfied: December 6, 1889; December 5, 1890; February 7, 1891; February 5, 1892; February 4, 1893; February 3, 1898. On September 14, 1898, another execution was issued and was levied on certain real estate. Upon this execution the sale in question was made. The execution of February 3, 1898, next preceding the one upon which the sale was made, was regular in all respects save that it was not signed by the clerk of the court issuing it. If this execution was void because of the lack of the clerk's signature, the judgment had become dormant before the issuance of the execution of September 14, 1898, upon which the sale was made. The execution defendant moved to vacate the sale for the reason that the judgment had become dormant on account of the nullity of the execution of February 3, 1898. The execution plaintiff moved for leave to amend the unsigned writ by causing the clerk to attach his signature thereto. This motion was sustained and the execution was signed. A motion was then made to confirm the sale. This motion was sustained and the sale confirmed. The sole question, therefore, is, Was the execution of February 3, 1898, void and unamendable?

In *Dexter v. Cochran*, 17 Kan. 447, it was held that a summons issued out of the district court, but without a seal, was void. The reason for this ruling was not specially discussed, but it was placed upon the ground that section 1 of article 3 of the constitution requires that "all courts of record shall have a seal to be used in the authentication of all process." In **606**

Lindsay v. Commissioners etc., 56 Kan. 630, it was ruled: "A paper purporting to be a summons, and which is not signed by the clerk of the district court, is invalid; and a motion made by the defendant, who specially appears, to set aside the service of a copy of the paper made upon him should be allowed."

This decision was based upon section 59 of the Civil Code (Gen. Stats. 1897, c. 95, sec. 54; Gen. Stats. 1899, sec. 4305), which, among other things, requires that a summons be signed by the clerk. In *Gordon v. Bodwell*, 59 Kan. 51, 68 Am. St. Rep. 341, it was ruled by a majority of the court: "The provision contained in section 1 of article 3 of the constitution that 'all courts of record shall have a seal to be used in the authentication of all process' is mandatory, and an order of sale issued without the seal of the court is void; and the court has no power, after a sale made thereunder, to allow the process to be amended by attaching the seal."

The first two cases cited are unlike the present one in that the writs in question were summonses, and also in the further respect that no motions were made to amend the defective process, and the case first cited differs from this in the further respect that the seal of the court, not the signature of the clerk, was omitted. The case last cited is also unlike the present one in that the defect in the writ consisted in the omission of the seal, not the signature of the clerk. The ground of the decisions in *Dexter v. Cochran*, 17 Kan. 447, and *Gordon v. Bodwell*, 59 Kan. 51, 68 Am. St. Rep. 341, as expressed in the last case, was that the constitutional requirement to authenticate process with the seal of the court was mandatory. The holding of the majority of the court in the last case was: "As the constitution requires the use of a seal in ⁶⁰⁷ the authentication of all process, no distinction can be drawn between original, mesne, and final process; that the constitutional provision is mandatory, and its force may not be impaired by the legislature, either by attempting directly to dispense with its requirements or through the indirect method of allowing the process to be amended after it has spent its force."

The reasoning in that case, however, cannot be applied to the facts of the present one. There is no constitutional direction to authenticate process with the signature of the clerk issuing it. The requirement in that respect is statutory. The legislature need not have made the requirement. It could not, however, have dispensed with the requirement to authenticate pro-

cess with the seal of the court because the constitution ordains that to be done.

Constitutional provisions are rarely directory, but are meant to be obeyed in strictness of letter. It is foreign to the high purpose of an organic law to give advisory directions. Occasionally the object of a constitutional provision and the language in which its meaning is expressed justify the view that it was intended to be directory only, but, in the main, constitutional ordinances are intended to be viewed as mandatory. In such cases, a failure to obey the constitutional command prevents the thing done from acquiring any legal efficacy. It is different, however, in the case of many legislative requirements. The general rule is that, where the provision of the statute is of the essence of the thing required to be done, and by which jurisdiction to do it is obtained, it is mandatory, but where the required act is in the nature of an incident to the thing to be done, and especially after jurisdiction to do it has been first obtained, it is directory. Tested by these principles, we are quite well satisfied that the lack of the clerk's ^{ess} signature to the execution of February 3, 1898, was an amendable defect. The requirement of the statute to authenticate mesne process by the clerk's signature is directory, not, however, in the sense that it may be willfully disregarded, but in the sense that upon discovery of the omission the lack may be supplied, and the defect cured nunc pro tunc by an order for amendment. The statute of amendments is very liberal and is of equal efficacy, at least in most particulars, with the statutory requirement to authenticate process with the signature of the clerk. The Civil Code, section 139 (Gen. Stats. 1897, c. 95, sec. 139; Gen. Stats. 1899, sec. 4389), provides: "The court may, before or after judgment, in furtherance of justice and on such terms as may be proper, amend any pleading, process, or proceeding by adding or striking out the name of any party, or correcting a mistake in the name of a party, or a mistake in any other respect."

The general rule is that defects in process of the character of that in question may be amended under the authority of statutes like the one quoted. The decisions upon the subject are cited in the opinion of the court in *Gordon v. Bodwell*, 59 Kan. 51, 68 Am. St. Rep. 341, and need not be discussed. The fact, however, that the defect in the writ under consideration in that case was the lack of the seal of the court, and was not, as in this case, the omission of the clerk's signature, justifies the different holding that is now made. In the one case the

constitution was disregarded; in the other a statute only was violated. It is not within the power of the legislature to absolve from penalties consequent upon the violation of a constitutional command. It is, however, within its power to provide a curative remedy for an infraction of its own enactments. This it ^{has} done by a general provision covering cases like the one in question. The execution creditor availed himself of the benefit of this provision and thereby cured the defective process.

Whether the statute will authorize the amendment of the initial writ issued in a case—the summons by which jurisdiction of the person is obtained—is a question with which we have no concern, and it is not decided. It was held in *Lindsay v. Commissioners etc.*, 56 Kan. 630, that a summons without the signature of the clerk was invalid and should have been quashed; but the question whether such kind of writ was amendable was not presented in that case, and therefore was not determined. It is presented in this case as to process to sell land issued after jurisdiction obtained, and the holding is that the amendment may be made.

The judgment of the court below is therefore affirmed.

AN EXECUTION MAY BE AMENDED in matters of form and as to clerical errors and omissions, but not as to matters of substance: *Blanks v. Rector*, 24 Ark. 496, 88 Am. Dec. 780. If no person is named therein as plaintiff in the judgment upon which it is issued, the officer issuing it may amend it by inserting the name of the plaintiff: *Smith v. Bell*, 107 Ga. 800, 73 Am. St. Rep. 151.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

LAROUSSINI v. WERLEIN.

[52 Louisiana Annual, 424.]

LANDLORD AND TENANT—LEASE, WHEN COMPLETE.
A verbal contract of lease, complete in itself independent of any writing, and unaccompanied by an intention to have it reduced to writing as perfecting it, is an enforceable contract. If such verbal contract is made and subsequently the parties agree that it shall be reduced to writing and signed, but this is never done, it is still enforceable as a binding contract.

LANDLORD AND TENANT—VERBAL LEASE, WHEN INCOMPLETE.—If a verbal contract of lease is agreed upon with the understanding and intention that it shall be reduced to writing and signed, and that the written lease shall take the place of the verbal agreement, then, until the written lease is drawn and signed, the contract is incomplete, and either party before signing may retract, decline to go further, and refuse to consummate the agreement.

H. Denis and B. K. Miller, for the appellant.

Lazarus & Luce and E. T. Merrick, for the appellee.

424 BLANCHARD, J. Plaintiff sues to enforce a verbal contract of lease on valuable property in New Orleans, for the term of five years at seven hundred and fifty dollars per month, or nine thousand dollars per annum.

His contention is, that there was entered into between himself and defendant a complete and final verbal contract of lease, for the more secure proof of which an act in writing was to have been executed; **425** but that the binding obligation of the agreement was in no manner to depend upon the said writing, or to be suspended, or revocable, in the meantime.

The contention of the defendant is, that while the lease of the property was negotiated at personal interviews between him-

self and plaintiff, the verbal agreement was only preliminary to a written contract intended to be passed, and until the latter was consummated, neither party was bound by the verbal agreement.

The parties sustained at the time the relation of lessor and lessee toward each other. The defendant was occupying the identical premises under a previous five years' lease, which was drawing toward its close, and the contract now declared on was in renewal of the lease for another five years, at a rate of rental fifty dollars per month greater than the then existing lease called for. The latter was in writing—an authentic act—and rent notes for the monthly payments of seven hundred dollars had been given. It was in contemplation that rent notes for the renewed lease were to be given.

About a week after the verbal agreement of renewal had taken place, the plaintiff called at the office of a notary public, and informing the latter he had leased his store to the defendant, mentioning the terms of the new lease and the monthly rental, requested him to draw up an act of lease substantially similar to the one then existing between the parties for the same premises.

The notary did so, and also prepared sixty rent notes, at seven hundred and fifty dollars each, to cover the five years' lease. He then notified defendant the lease and notes were ready for signature. Some delay ensued, but in the course of a week or ten days later the plaintiff, with the notary, repaired to the office of the defendant. The lease, as prepared by the notary, had been handed to the defendant at his request for inspection some days before, and he had it in his possession when the notary and the plaintiff called. The notary informed him the object of the call was to formally execute the lease and obtain his signature to the rent notes. Whereupon defendant replied that he had changed his mind and would not execute the lease, and handed the written instrument and the unsigned notes back to the notary.

Following this, the plaintiff brought an action to enforce the ⁴²⁶ specific performance of defendant's promise to sign the act of lease in execution of the verbal agreement. That suit was dismissed on exception, and the judgment of dismissal, on the ground of no cause of action, was affirmed here: See *Laroussini v. Werlein*, 48 La. Ann. 13.

The present suit was then instituted, basing recovery on the verbal lease. It was met by the plea of *res judicata*, filed by

way of exception, predicated upon the judgment in the first case. The plea was sustained by the trial court and the suit dismissed; but on appeal here that judgment was reversed, the case ordered reinstated on the docket, and a trial upon its merits directed to be proceeded with: See *Laroussini v. Werlein*, 50 La. Ann. 637. Trial followed, with the result that plaintiff's demand was rejected. He appealed and this appeal is now before us.

The question presented is, whether there was a valid, binding agreement, amounting to a completed contract, verbally made between the parties, which is enforceable irrespective of the fact that the same was not followed by the execution of a written contract of lease; or whether there was only a bargain between the parties to lease, or a completed negotiation to that end, or an understanding and agreement as to terms, conditions, duration, etc., which was to attain to the dignity and importance of a contract of lease, and obligatory, only after the same had been reduced to writing and signed by the parties. If the first, the case is with the plaintiff; if the latter, with the defendant.

A verbal contract of lease, complete in itself, independent of any writing, and unaccompanied by an intention to have the same reduced to writing as perfecting it, is an enforceable contract. And if such a verbal contract be made, and subsequently the parties agree that the same shall be reduced to writing and be signed, and afterward there is a failure to so reduce it to writing and to signature—one of the parties refusing—it is still enforceable as a binding contract: *Carlin v. Harding*, 10 La. 225; *Avendano v. Arthur*, 30 La. Ann. 321.

But if, when a verbal contract of lease is agreed on, it is understood, contemplated, and intended that it should be reduced to writing, that there should be a written lease, that the written lease should take the place of, and stand for, what has been agreed on verbally in respect to ⁴²⁷ the leasing of the property, then until the writing is drawn up and signed the contract is inchoate, incomplete, and either party, before signing, may recant, retract, recede, withdraw, decline to go further, refuse to consummate: *Fredericks v. Fasnacht*, 30 La. Ann. 117; *Villere v. Brognier*, 3 Mart. 349-527; *Bloeker v. Tillman*, 4 La. 80; *Wolf v. Mitchell*, 24 La. Ann. 434; *Fernandez v. Soulie*, 28 La. Ann. 31; *Des Boulet v. Gravier*, 1 Mart., N. S., 421-492; *Meyer v. Labau*, 51 La. Ann. 1729. Judged by the rule thus laid down, the case at bar is with the defendant.

Undoubtedly, these parties litigant did agree verbally upon a contract of lease in renewal of the then existing lease; but that this was to be followed by a writing setting forth the same, and to be signed by the contracting parties, which writing should take the place of and stand for what had been agreed on verbally, is established beyond peradventure.

This was, we think, the understanding and intention of the parties, and this understanding and intention was contemporaneous with the verbal agreement made. After agreeing verbally with the defendant about the lease, plaintiff left the store, where the interview had been held, to have, later, the contract drawn by his notary. Defendant had suggested that it be merely indorsed upon the then existing written contract of lease, but plaintiff had not consented to this. He desired a formal contract drawn in renewal of the lease, with accompanying notes, and such contract was drawn and the notes prepared.

Whether the renewal contract was to be indorsed upon the old contract of lease and signed by the parties, or whether a fresh contract was to be drawn and signed, equally evidences the intention that a written contract was to be made.

The agreement reached, as to the renewal of the lease, was to be reduced to writing in some form or another. The law is not particular as to this form, nor as to the verbiage used, nor as to the length of the contract, and however brief the writing, if it were part of the understanding there should be a writing, as we hold was the case, such writing suffices, provided it sets forth the intention of the parties, and until it is drawn up and signed no contract of lease was perfected.

Plaintiff does not deny that a writing setting forth the lease was contemplated and intended at the time the verbal agreement was made, ⁴²⁸ but contends that this was to serve only as proof of the agreement, and that the contract being complete without it, the parties remained bound even though the written act was not executed.

Considering the many circumstances disclosed by the record militating against it, we cannot accept this view of the case. Nor do we think it can be pressed with consistency in face of the fact that having failed to obtain the signature of defendant to the new contract and notes, plaintiff first brought suit to compel the signing of the same.

The contract was to be reduced to writing; the lease had yet to be executed. There is no contradiction as to that. This understanding, contemplation, and intention as to the writing, as

to the execution of a written lease, was part of the transaction that went to make up the verbal agreement, and the same cannot be held to have been completed until the written lease was prepared and signed.

The plaintiff had had a long experience in leasing real estate and is a conservative business man. A five years' verbal lease of high-priced property was not a reasonable business transaction. He had never finally closed a contract of lease except in writing, and had never put a tenant in possession of premises except under a written contract of lease.

These are strong circumstances militating against the probability of a completed verbal contract having been made.

In *Wolf v. Mitchell*, 24 La. Ann. 434, where a verbal lease of property for five years at the price of nine thousand dollars for the first year, ten thousand dollars for the second year, and twelve thousand dollars for the three following years, was sought to be enforced, it was held, "it being shown that it was the obvious intention of the parties to reduce the terms of the lease to writing before it was considered as complete, the defendants, as lessees, could not be held on the plaintiff's showing a verbal lease merely."

And in this connection it was said: "In making a contract to the extent, amount, and importance of the one under consideration, it is reasonable that the parties should have reduced it to writing so as to make it binding in all its stipulations before considering it fully closed."

In the lease under consideration, as shown by the copy plaintiff had drawn up by the notary, there were many and drastic stipulations, such as, that the nonpayment of any one of the rent notes at maturity ⁴²⁹ should cause all the remaining notes to become due and demandable, payment of attorneys' fees (five per cent) in case of suit to collect the rent, keeping of the premises in good order at the expense of the lessee, the nondissolution of the lease in the event the building should be destroyed by fire, the reservation of the right by the lessor to cancel the lease in the event of the violation of any of the conditions by the lessee, etc.

It surely was not intended that a contract of lease embracing concessions, rights, and obligations of this character was to be left to the doubts and uncertainties of a mere verbal agreement. And that the written instrument which was to follow was only to furnish proof of a completed, anterior, verbal contract of lease is not, we think, sustained by the evidence. Nor does it

comport with what is usual among business men in transactions of that character.

We incline to the conviction that the written act which the parties intended to execute between themselves was to be the contract itself. This being so, the law fixed their rights and responsibilities, and neither party was bound until the written instrument was passed, and either had the right, before consummation, of receding.

Judgment affirmed.

Mr. Justice Breaux dissents.

Rehearing refused.

CONTRACTS, WHEN COMPLETE.—When parties enter into an oral contract, with the understanding that it is to be reduced to writing before going into effect, it is not binding until put in writing: *Mississippi etc. Co. v. Swift*, 86 Me. 248, 41 Am. St. Rep. 545. However, a contract to execute a certain instrument, the terms of which are mutually agreed upon, is as valid and obligatory as the written contract itself would be if executed. Neither party is at liberty to refuse to perform or enter into the agreement as stipulated: *Sanders v. Pottlitzer etc. Co.*, 144 N. Y. 209, 43 Am. St. Rep. 757.

ON PAROL LEASES, see the monographic note to *Wallace v. Scoggins*, 17 Am. St. Rep. 752-757.

CROWLEY v. WEST.

[52 Louisiana Annual, 527.]

MUNICIPAL CORPORATIONS—POWER TO CONFINE BUSINESS TO DESIGNATED LOCALITY.—A municipality has no general or implied authority to suppress or confine a lawful business to a designated locality when such business is not a nuisance per se, and the statute under which the municipality acts only confers authority in specific terms to prescribe regulations whereby the place in which such business is conducted shall be kept clean and in good order.

MUNICIPAL CORPORATIONS—UNREASONABLE ORDINANCES.—A municipal ordinance which permits certain livery-stables to be maintained in the business center of the city, while another stable and all others thereafter erected are confined to a designated locality remote from such business center, is an unreasonable discrimination and unconstitutional and void.

H. Story and P. S. Pugh, for the appellant.

P. J. Chappuis and Saunders & Gurley, for the appellee.

527 **MONROE, J.** Defendant was fined for violating an ordinance of the town of Crowley which prohibited the establishment of livery-stables, except within certain limits; and he has appealed to this court, on the ground that said ordinance is in contravention of statutory and constitutional law.

The ordinance in question was adopted in 1898, and, whilst it declares: "Section 1. . . . That hereafter it shall be unlawful to establish, maintain, locate, or operate a livery, feed, sale, and boarding stable within any portion of the corporation limits of the town of Crowley, except as hereinafter prescribed," and then proceeds to establish the limits, remote from the business center of the town, in which such stables may be conducted, and to provide penalties for violation of the ordinance, the concluding section reads as follows, to wit:

"Sec. 3. That the provisions of this ordinance should not be applied to livery, sale, boarding, and feed stables already in existence and under operation; provided, that the effects of the ordinance shall not be governed by this section, which is hereby declared to be a distinct and independent part of the ordinance."

The admissions and the evidence show that, when the case was tried, there were five livery-stables within the prohibited section of the town; one of them being conducted by the firm of which the defendant is a member, and another being a stable which had been sold before the adoption of the ordinance, by defendant's present partner, to the person who is now conducting it. After this sale was made, and before the adoption of said ordinance, C. R. West, defendant's partner, purchased a lot, for which he paid one thousand dollars, also within the prohibited district, and ordered lumber and material for the erection thereon of a new stable, which, as we understand, has been since built at a cost of thirteen hundred dollars; and said firm have, in the meanwhile, and after the adoption of said ordinance, carried on business in the stable, for the maintenance of which the arrest was made.

528 The ordinance, as it stands, will affect no other existing stable than that conducted by the defendant's firm, and said firm, if the ordinance is enforced, will be compelled to move within the limits designated, with the result that it will be unable to compete with the other stables, which are in the business portion of the town.

The points relied on by defendant are: That the corporate powers of the town of Crowley are derived from act 136 of 1898, and that said act confers no authority for the adoption

of the ordinance in question. That said ordinance is invalid, because it was not "entered in a well bound book," as required by said act. That said ordinance is unconstitutional and illegal, for the further reason that it is "discriminatory, unreasonable, arbitrary, and unequal in its operation and effect," and would "operate a hardship on defendant, by compelling him to remove his stable from a limit, where livery-stables are now prohibited to a locality designated and set aside for that purpose, remote and distant from the central portion of business, while others, his competitors, are permitted to carry on a similar and like occupation, unmolested, and free from municipal interference and objection." That said ordinance abridges defendant's liberty with respect to the selection of a means of a livelihood, and denies him the enjoyment of his rights and privileges, and of his property, as guaranteed by the constitution of the United States.

The town of Crowley was originally incorporated in 1894, agreeably to the provisions of act No. 49 of 1882. The act of 1882, however, purports merely to regulate the "manner" of incorporation, and contains no specific grants of power.

Whatever authority was exercised by the corporation thus established must, therefore, have been implied from the fact of its authorized existence as a municipal corporation. In 1899, said corporation, by the vote of its electors, and the proclamation of the governor, as required by the act, accepted the offer made by the state, by means of act No. 136 of 1898, and became a "town" under said act.

The act of 1898 is of much broader scope than that of 1882, since the latter provided only for the "manner" of effecting incorporation, whilst the former provides not only for the creation of corporations where none previously existed, and for the conversion of corporations, already established under previously adopted statutes, into ⁵²⁹ corporations acknowledging it, said act, as the authority within which alone they exist; but it also specifies, in terms of great exactness, the powers which are to be exercised by the corporations so created, or converted, and it concludes with a clause which repeals all laws contrary to it or "on the same subject matter," except as otherwise provided in the act itself.

The acceptance of this act by the town of Crowley, as the Jordan through which it was born again, if it does not cut off inquiry into any previous existence, at least reduces that inquiry within very definite bounds. It may be conceded that

existing ordinances, adopted during such previous existence, were not necessarily annulled by the regeneration of the town thus effected. But it must also be conceded that no such ordinance can be enforced, if found to conflict with the law within which the town now lives and moves and has its being, since the creature, in matters of this kind, is not more powerful than the creator.

The charter of 1894 assumed for the town the power, among other things, to regulate the "location," as well as the inspection and cleaning of "stables, cattle yards, slaughter-houses, soap, glue, tallow, and leather factories, depositories for hides, and all such places of business, likely to be, or to become, detrimental to health," etc.; and it was under this charter that the ordinance in question which undertakes "to regulate the location of stables" was adopted. But, since the acceptance of the act of 1898, there is no room for the assumption or exercise of any power not expressly or impliedly conferred by the act.

It is not pretended that the act of 1898, in express terms, confers upon corporations established under it any authority to regulate the location of stables. The remaining question then is, Can such authority be implied?

The act provides, in substance:

"Sec. 13. That each city, town, or village, which is incorporated, shall be governed by the provisions of this act and shall be a municipal corporation, with power: 1. To sue and be sued, etc.; 2. To purchase and hold real estate, etc.; 3. To make all contracts, etc.; 4. To exercise such other or further powers as are herein conferred.

530 "Sec. 14. That the powers herein granted shall be exercised by the mayor and board of aldermen, etc.

"Sec. 15. That the mayor and board of aldermen shall have power to enact ordinances for the purposes hereinafter named, and such as are not repugnant to the laws of the state, and they shall have power: 1. To levy and collect taxes for general purposes, etc.; 2. To levy and collect taxes to pay interest, etc.; 3. To make regulations to secure the general health of the municipality; to prevent, to remove, and to abate, nuisances; to regulate or prohibit the construction of privy vaults and cess pools and to regulate or suppress those already constructed; to compel and regulate the connection of all property with sewers and drains; to suppress hogpens, slaughter-houses and stockyards and to locate the same with the concurrent approval of the board of health, or to regulate the same and to prescribe

and enforce regulations for cleaning and keeping the same in order, and the cleaning and keeping in order of warehouses, stables, alleys, yards, private ways, outhouses, and other places, where offensive matter is kept or allowed to accumulate; and to compel and regulate the removal of garbage and filth beyond the corporate limits."

And there are twenty-nine more paragraphs in section 15, each conferring separate and specific powers on cities and towns and villages falling under the dominion of the act. In section 16 there are eleven distinct paragraphs, conferring specific powers on cities and towns, but not on villages; and in section 17 there are five paragraphs, which confer still further specific authority on cities and towns having more than two thousand inhabitants. But nowhere else in the act are stables mentioned, save in the paragraph above quoted, where the corporations affected by said act are authorized to prescribe and enforce regulations for cleaning them and keeping them in order, in common with warehouses, alleys, private ways, outhouses, etc., whilst, in the same connection, and as part of the same sentence, the power is conferred to "suppress hogpens, slaughter-houses and stockyards, or to locate the same."

It will be observed, however, that the power to "suppress" and to "locate," thus conferred, is granted with the qualification that it is to be exercised "with the concurrent approval of the board of health." The question, then, very naturally suggests itself, If the legislature ⁵³¹ had intended that the municipal corporations affected by the act of 1898, should be authorized at pleasure to "suppress" or to "locate" warehouses and stables, what was to prevent the use of language granting that authority, and why was language used which authorizes other action, and falls short of authorizing such suppression or location? And, again, is there any reason to suppose, taking the whole paragraph, quoted together, or taking the various provisions which have been referred to together, that the law makers, in specifically authorizing the suppression or location of hogpens and slaughter-houses would require such action to be taken "with the concurrent approval of the board of health," and yet that they intended that warehouses and stables should be suppressed, or located upon the outskirts of the town, without the concurrence of the board of health, although the authority, as granted, with respect to them, extends only to the prescribing and enforcing of regulations for keeping them clean and in order?

The law applicable to the conditions as presented, is, as we think, fully stated in the following language:

"The extent of municipal authority over nuisances depends, of course, upon the powers conferred in this regard upon the municipality. They may be general or specific or both. The authority to preserve the health and safety of the inhabitants and their property, as well as the authority to prevent and abate nuisances, is a sufficient foundation for ordinances to suppress and prohibit whatever is intrinsically and inevitably a nuisance. The authority to declare what is a nuisance is somewhat broader, but neither this nor the general authority mentioned in this last preceding sentence will justify the declaring of acts, avocations, or structures, not injurious to health or property, to be nuisances. . . . It is not unusual to invest the municipal council with special authority with respect to particular avocations, trades, acts, omissions, and structures, with a view to conserve the public health and safety.

"The terms in which such authority is conferred measure its scope, but, in view of the end for which it is given, it is not subjected to a hostile, or even to a narrow, construction": 1 Dillon on Municipal Corporations, par. 379.

"It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws, either of the city or ⁵³² state, within which a given structure can be shown to be a nuisance, can, by mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all property in the city at the uncontrolled will of the temporary local authorities": *Yates v. Milwaukee*, 10 Wall. 497.

It has frequently been held that a livery-stable is not a nuisance per se: *Shiras v. Olinger*, 50 Iowa, 571, 32 Am. Rep. 138; *Pickard v. Collins*, 23 Barb. 444; *Harrison v. Brooks*, 20 Ga. 537; *Burditt v. Swenson*, 17 Tex. 489, 67 Am. Dec. 665; *Wood on Nuisances*, secs. 528, 529. And in the case at bar, the mayor, before whom it was tried, declined to permit the defendant's counsel to ask a witness who was upon the stand, "In what manner, and in what condition is the stable in controversy kept?" on the ground that the question before him was, not how the stable was kept, or whether it was a nuisance, but whether or not the town had the right to enforce the ordinance, which prohibited the keeping of the stable where it then was. There is nothing in the record, therefore, to indicate

that the defendant's stable was objectionable in any way whatever, or to anybody, except: 1. The preamble to the ordinance under which he was prosecuted, which reads: "Whereas, the indiscriminate establishment of livery, feed, boarding, and sale stables, endangers the public health and the public safety, prejudices the comfort and well-being of the community, depreciates the value of property, and greatly increases the danger of fire, therefore," etc.; and 2. The following statement, embodied in the mayor's reasons for judgment, to wit: "It is even more than an ordinary stable, being large, and being used for the penning and accommodation of a large number of animals for sale, and which make considerable litter, noise, and disturbance by their constant tramping upon the floor, thus affecting the health and comfort of the surrounding residents."

This declaration in the ordinance cannot fasten upon a business which is not in itself a nuisance the pernicious, destructive, and altogether alarming qualities which the language used attributes to it, any more than these qualities can be fastened upon a "warehouse," or an "outhouse," by the mere use of language. Nor can we accept the statement in the opinion of the mayor as being conclusive upon the point to which he refers, since we find absolutely no testimony to that effect in the record, not even that of the prosecuting witness, and ⁵³³ the mayor, as has been stated, had ruled out all evidence upon the subject offered in behalf of the defendant.

We have, then, a case in which it appears that a person, engaged in a business which is conceded to be lawful, in which four other persons, or firms, are engaged, in the same town, which, so far as the record discloses, is conducted properly and inoffensively, is nevertheless, by the operation of a municipal ordinance, arrested and fined, because he has failed to establish his said business in a part of the town remote from the business center, rather than at the place which he considers most advantageous; and it further appears that the other four persons, or firms, engaged in the same business, are not to be affected by the ordinance, but are to be permitted to conduct their business where they please, and that it naturally pleases them to remain in the central part of the town, from which the defendant is to be permanently excluded. The proposition that the defendant can be thus discriminated against, and that his four competitors in business can be thus secured the monopoly, in perpetuity, of the livery-stable business in Crowley, cannot be seriously entertained: *State v. Mahner*, 43 La. Ann. 496;

State v. Dulaney, 43 La. Ann. 500; State v. Garibaldi, 44 La. Ann. 809, 814; State v. Sarradat, 46 La. Ann. 703; State v. Kuntz, 47 La. Ann. 106; Tugman v. Chicago, 78 Ill. 409; Dillon on Municipal Corporations, 4th ed., par. 322.

It is said, however, that, by the terms of the ordinance itself, the section by which it was made inapplicable to those keepers of livery-stables who were in business before its adoption is to be regarded as in the nature of an independent enactment, which may be declared null without affecting the other sections, and that the ordinance may be held to apply to all livery-stables in Crowley and to require the proprietors of such stables either to close them up, and to go out of business, or else to move them within the territory prescribed by the ordinance.

Pretermittting the consideration of the question whether such a method of dealing with the ordinance would be competent, and conceding, *arguendo*, that the section in question could be eliminated as suggested, we have remaining what may be called the main question, i. e., Assuming that the ordinance is to apply to all livery-stable keepers in Crowley, and that, under its provisions, they will be compelled to move their establishments from the center of the town to the district ~~534~~ designated therein, is the said ordinance a competent exercise of the authority vested in the corporation?

We find nothing in the record which would justify us in answering this question in the affirmative. Ordinances of municipal corporations, purporting to have been adopted in the exercise of implied or general authority must be "lawful," "reasonable," "impartial," "fair," "general," "consistent with public policy," and "not in contravention of common right": Dillon on Municipal Corporations, 4th ed., pars. 319-323, 325, 326, 329. It is doubtful whether the ordinance in question meets any of these requirements. The business to be affected is a legitimate business, and there is not a syllable of testimony in the record before us going to show that it is conducted otherwise than in a proper manner, and inoffensively to others. The declarations of the preamble to the ordinance are met by the admitted fact that four out of the five stables in Crowley which are said to endanger public health and safety, prejudice the comfort and well-being of the community, depreciate the value of property, and increase the danger of fire, were to be left untouched, whilst the penalty for all this capacity for calamity breeding was to be visited on the defendant as the proprietor of the fifth stable, which is not shown to differ in any respect from

the others. Under these circumstances, even if the act of 1898 had not granted the corporate authority, with respect to stables, in specific terms, the general or implied authority to adopt ordinances in the interest of the general welfare of the community would not authorize such an oppressive discrimination between the defendant and other keepers of livery-stables.

But the specific character of the grant of authority to prescribe regulations for the "cleaning" and "keeping in order" of stables, warehouses, etc., taken in connection with the authority granted, in the same section, and in equally specific terms, to "suppress" or "locate" hogpens, slaughter-houses, etc., and taken in connection with the general tenor of the act, leaves no room for doubt that it was the intention of the law makers to distinguish between establishments of different kinds, and that it was not intended that any greater authority should be exercised with respect to stables and warehouses than that which is conferred in terms. And this limitation applies equally to ordinances in existence, when the town passed under the dominion of the act of 1898, and to those subsequently adopted: *Shreveport v. Robinson*, 51 La. Ann. 1314.

⁵³⁵ It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed; that the ordinance No. 88, under which defendant was convicted and sentenced, be decreed null, and of no effect, and that the defendant be discharged from further prosecution thereunder.

LIVERY-STABLES in municipalities are not per se nuisances: *Phillips v. Denver*, 19 Colo. 179, 41 Am. St. Rep. 230. On restrictions upon the location of livery-stables, see *Chicago v. Stratton*, 162 Ill. 494, 53 Am. St. Rep. 325; *Phillips v. Denver*, 19 Colo. 179, 41 Am. St. Rep. 230; *Shiras v. Olinger*, 50 Iowa, 571, 32 Am. Rep. 138, and note.

ON MUNICIPAL REGULATION OF LAWFUL BUSINESSES, see the monographic notes to *Jacksonville v. Ledwith*, 23 Am. St. Rep. 581-584; *Caldwell v. Alton*, 85 Am. Dec. 286-289; *Robinson v. Mayor etc.*, 34 Am. Dec. 637-640.

STATE v. MICHEL

[52 Louisiana Annual, 986.]

CONSTITUTIONAL LAW—PRESENTATION OF BILL TO GOVERNOR.—Under a constitutional provision that every bill which shall have passed both houses of the legislature shall be presented to the governor, such bill is presented when it is carried by the chief clerk of either house and offered or tendered to the governor or his secretary. It makes no difference that he does not receive it, or refuses to receive it.

CONSTITUTIONAL LAW—COMPUTATION OF TIME.—Under a constitutional provision that if any bill passed by the legislature shall not be returned by the governor “within five days after it shall have been presented to him it shall be a law,” the day on which such bill is presented to the governor is not to be included in the computation of the five days, but the last day of the specified period is to be computed.

DAY—COMPUTATION OF TIME.—A day, in the computation of time, begins at 12 o'clock midnight and extends through twenty-four hours to the next 12 o'clock midnight.

TIME—COMPUTATION OF—SUNDAY.—If a limitation of time is fixed within which a particular act or thing is to be done, if done at all, after which performance would be without effect, and if the time exceeds one week, an intervening Sunday is to be included in the computation; if less than a week, Sunday is to be excluded.

TIME—COMPUTATION OF—SUNDAY.—If the time stipulated within which an act must be done does not necessarily include Sunday, that day is excluded from the computation without express mention of the fact. If the time stipulated must necessarily include Sunday, that day is not excluded from the computation, unless there is an express declaration to that effect.

TIME—COMPUTATION OF—SUNDAY.—If one of the five days accorded the governor by the constitution in which to return a bill to the legislature with his objections happens to be Sunday, or a legal holiday, that day is not to be computed as one of the five days.

CONSTITUTIONAL LAW—CONSTRUCTION OF WORDS.—Whatever doubt may exist in the judicial mind as to the proper meaning to be given to words used in a statute or constitutional provision, it is safely resolved in favor of that construction sanctioned alike by the policy of the law and the moral sentiment of the people.

A. Voorhies, for the appellant.

M. J. Cunningham, attorney general, and C. M. Cunningham, for the appellee.

987 **BLANCHARD, J.** This is a proceeding by mandamus to compel the secretary of state to promulgate as a law, duly enacted, an act of the general assembly of the state of Louisiana, known as “House Bill No. 46” entitled “An act to amend and re-enact act No. 66 of the acts of 1888, entitled ‘An act

to regulate the practice of pharmacy; to regulate the sale of compounded medicines and drugs, preparations, and prescriptions; to regulate the sale of poisons; to create a state board of pharmacy, and to regulate the emoluments thereof; to prevent the practice of pharmacy by unauthorized persons, and to provide for the trial and punishment of violators of this act by penalties and through civil process, and to repeal all laws contrary to, or in conflict with any of the provisions of this act.' ”

§ 338 The contention of the relators is that at a late session of the general assembly the aforesaid bill duly passed both houses and was on the 8th of July, 1898, signed by the speaker of the house of representatives and by the lieutenant governor and president of the senate; that the enrolled copy of the bill so signed was presented to the governor of the state on the same day, July 8, 1898, for executive approval; and that the act not having been returned by the governor within five days thereafter, the general assembly continuing in session, it had become a law as though the executive signature in approval thereof had been attached.

The further contention is that application was made to the secretary of state to promulgate the act in accordance with law, and that he refuses to do so.

To the preliminary writ, requiring him to show cause why the act should not be promulgated, the secretary of state, through the attorney general, answers, in effect, that he should not be required to promulgate the act as a law of the state for the reason that the same was vetoed by the governor within five days after he received the same at the hands of the messenger of the house, and was not, subsequently, passed by the action of the two houses of the general assembly, the governor's veto to the contrary notwithstanding.

The case was tried below on the following admission of facts:

“It is admitted that House Bill No. 46, after being signed by the speaker of the house and lieutenant governor on the 8th of July, 1898, was carried to the governor's office about 10 or 11 o'clock on the night of July 8th. That the governor's private secretary had gone home and that the governor declined to receive the bill at that hour. That this bill was in a batch containing a large number as shown by the receipts; that on the next day, July 9th, the bills were delivered to the governor, and he signed a receipt which had been prepared on July 8th without noticing the date. That the engrossed copy of the bill, along with the copies of the other bills included in the

same receipt, was delivered to the secretary of state at 4 P. M. on July 9th, as shown by memorandum made by the secretary of state at that time. That the secretary of state also signed a receipt for this bill, together with the other bills, dated July 8th, without noticing the date.

"It is further admitted that the governor's veto reached the house of representatives at 11:20 P. M. on July 14th, just before ⁹³⁹ adjournment, and that the house did finally adjourn that night at 12 o'clock without acting on the veto. That the governor takes no note of the hour that a bill is received or the hour when a veto is sent in. But the secretary of state noted the hour that he received the engrossed copy of House Bill No. 46, and the clerk of the house noted the hour at which the veto came in."

There was judgment refusing to make the writ peremptory and dismissing the action at relators' cost. This appeal followed. The question first arising for determination is what constitutes a presentation of an act of the general assembly to the chief executive for his action, under the constitution.

If the act known as "House Bill No. 46" were, in the constitutional sense, presented to him on July 8th, and he did not return the same with his veto to the house in which it originated until more than five days after such presentation, then the act must (unless an intervening Sunday—one of the five days—is excepted from the computation) be considered as having become a law, and the veto without effect to prevent that consummation.

Article 41 of the constitution is imperative that: "As soon as bills are signed by the speaker of the house and president of the senate, they shall be taken at once, and on the same day, to the governor by the clerk of the house of representatives, or secretary of the senate."

The bill in question was signed by the speaker of the house and president of the senate on July 8, 1898. It therefore became the duty of the clerk of the house to take it at once, on the same day, to the governor, and he did so. It was between 10 and 11 o'clock at night, it is true, but the governor was in his office at the capitol building and it was "the same day" on which the presiding officers of the two houses had attached their signatures to the bill.

If the clerk of the house had not taken the bill that day, at once after its signature by the presiding officers of the two houses—certainly before 12 o'clock midnight—to the governor,

he would have failed in the duty prescribed for him by the organic law.

Article 76 of the constitution declares that: "Every bill which shall have passed both houses shall be presented to the governor. If he approve it, he shall sign it; if not, he shall return it, with his objections in writing, to the house in which it originated, etc."

940 The language is "every bill shall be presented to the governor." Here, the bill was carried to the governor's office; it was at night; the governor's private secretary had gone to his home, but the governor himself was there; the clerk of the house made known the object of his visit; the governor declined to receive the bill; the clerk withdrew and returned with the bill the next day, July 9, 1898, when it was received by the governor and a receipt signed dated July 8, 1898. It seems this receipt had been prepared by the clerk the evening previous, expecting the bill to be then received by the governor, and the next day when it was signed the date was not noticed.

Undoubtedly, the object of the clerk of the house in going to the executive office on the night of July 8th was to fulfill his constitutional duty of presenting the bill to the governor on the same day on which the presiding officers of the two houses had signed it. When he made known the purpose of his visit to the governor and tendered the bill, it was a presentation of it in the constitutional sense, and the fact that the governor declined to then receive it did not render nugatory and ineffective this presentation. To hold otherwise would put it in the power of the chief executive to delay at will the presentation of a bill to him, something the constitution is careful to guard against.

"If any bill," says the last clause of article 76 of the constitution, "shall not be returned by the governor within five days after it shall have been presented to him, it shall be a law in like manner as if he had signed it, unless the general assembly, by adjournment, shall prevent its return, in which case it shall not be a law."

The mandate of the organic law is not that the governor must act, in the way of a veto, within five days of his reception of a bill, but within five days of its presentation to him. If it were the first, he might, by not receiving a measure, hold it up until within five days of the end of a session of the general assembly, then receive it, and the adjournment taking

place would prevent its return, thus defeating its becoming a law, or in case it was returned with a veto message just prior to adjournment, action on the veto by the two houses would be prevented.

But the presentation of the measure being made to him—an offer of it to him, a tender of it to him—it can make no difference that he ⁹⁴¹ does not receive it. The constitutional requirement is fulfilled and from that moment the delay begins to run and he must act, if his purpose be to veto, within five days: See Opinion of Justices, 45 N. H. 611 et seq.

The bill in question having been presented on July 8th, the governor was entitled to “five days” for its consideration. Within that period he must return it with his objections, or else it becomes a law the same as if he had signed it, unless the general assembly, by adjournment, shall prevent its return, etc. “Adjournment,” as here used, means final adjournment at the close of the session; not adjournment for the day, or for several days during the session: Opinion of Justices, 45 N. H. 610.

If the house in which the bill proposed to be vetoed originated should happen not to be in session when the governor’s message arrived, delivery of the bill, with the governor’s objection, to the presiding officer of the body, or to its clerk, would seem, according to the adjudicated cases, to suffice; and in case neither the presiding officer, nor the clerk, can be found, its deposit on the presiding officer’s table or desk, or in the office of the clerk would, doubtless, likewise suffice: See Opinion of Justices, 45 N. H. 609, 610.

The day on which the bill is presented to the governor is not to be included in the computation of the five days, but the last day of the specified period is to be computed: *Sheets v. Selden*, 2 Wall. 190; *Corwin v. Comptroller*, 6 S. C. 394; *People v. Hatch*, 33 Ill. 14, 138; *Price v. Whitman*, 8 Cal. 412, 417; *Iron Mt. Co. v. Haight*, 39 Cal. 541; *Dwarris on Statutes*, 768, 769; *In re Senate Resolution*, 9 Colo. 632.

A “day” in this sense begins at 12 o’clock midnight and extends through twenty-four hours to the next 12 o’clock midnight: 2 Blackstone’s Commentaries, 141; Black’s Law Dictionary, verbo “Day”; Opinion of Justices, 45 N. H. 610. The governor has the whole of the twenty-four hours constituting a day. He has what is called a natural or astronomical day—not an artificial day. Bouvier, referring to “a day” as a division of time, says in its natural sense it consists of twenty-four

hours, or the space of time which elapses while the earth makes a complete revolution upon its axis: Bouvier's Law Dictionary.

942 See, also, Abbott's Law Dictionary, verbo "Day"; People v. Hatch, 33 Ill. 137.

In this case the bill is held to have been "presented" to the governor on July 8th. Excluding that day from computation, the five days given him by the constitution for its consideration began at 12 o'clock midnight just as the twenty-four hours constituting the 8th of July ended, and the twenty-four hours constituting the 9th of July began. Ordinarily, then, he was entitled to the twenty-four hours, respectively, of the 9th, 10th, 11th, 12th, and 13th of July in which to consider it and return it with his objections. But the 10th of July, 1898, was Sunday, and of this the court takes judicial cognizance.

As a consequence, the question next arising for determination is, Does Sunday count in the computation of the five days? Is it to be included or excluded? If the first, then the governor's veto of the measure on July 14th came too late; the bill had meanwhile become a law and thereafter its efficacy as such could not be destroyed by the veto message. If the second, the veto message, reaching the house of representatives, where the bill originated, at any time during the hours constituting July 14th, was timely.

There is a rule of general, though perhaps not of universal, acceptance, that where a limitation of time is fixed within which a particular act or thing is required to be done, if done at all, after which performance, or the doing of the thing, would be without effect, if the time exceed a week, an intervening Sunday is to be included in the computation; if less than a week, Sunday is to be excluded: 26 Am. & Eng. Ency. of Law, 10; Haley v. Young, 134 Mass. 366; Anonymous, 2 Hill, 375; Thayer v. Felt, 4 Pick. 354; Hannum v. Tourtellott, 10 Allen, 494; Cunningham v. Mahan, 112 Mass. 59.

Consideration of this rule commends its wisdom. The federal constitution allows the President of the United States ten days, Sundays excepted, to return a bill with his objections after its presentation to him. Many of the states of the Union allow ten days, Sundays excepted. Some allow a less number of days, Sundays excepted, and others a less number of days without mentioning Sunday. Where there has been an omission to except Sunday in the constitutional provision, and cases have gotten into the courts, no authoritative announcement of

the rule to be followed has been laid down, so ⁹⁴³ far as our research has extended. Indeed, no decision covering the exact case has been found anywhere.

There appear to be no adjudications on this point by this court in the past, though for more than thirty years the constitutional provision has been as it is now, viz., that if any bill shall not be returned by the governor within five days after its presentation, it shall be a law, etc.—Sunday not mentioned.

The constitutions of 1868, 1879, and 1898 all so declare, while the four earlier constitutions—those of 1812, 1845, 1852, and 1864—gave the governor ten days in which to return a bill with his objections, Sundays excepted.

It would seem that since the earlier constitutions expressly excepted Sunday and the later constitutions did not, the intention of the framers of the later constitutions was that Sunday should be counted in the five days allowed the governor.

But this first impression is obliterated when we consider and apply the general rule above referred to. Under the operation of that rule, had not the framers of the earlier constitutions expressly excluded Sundays from computation in the ten days given the governor, then Sunday would have been counted; whereas since, in the later constitutions, five days only are allowed—a time which does not necessarily include a Sunday—that day (Sunday), happening to be one of the five days, is excluded from the count.

Where the time stipulated was such that it did not necessarily include Sunday, Sunday is excluded from the computation without express mention of the fact; where the time stipulated must necessarily include Sunday, to exclude that day from the computation there must be an express declaration to that effect.

Such is the effect of the general rule laid down, and the framers of the several constitutions under which the state has been governed are presumed to have intended the language and phrases used in consonance therewith. It follows that if one of the five days accorded the chief executive in which to return a bill with his objections happens to be Sunday, the same is not to be computed as one of the constitutional “five days.”

This view is strengthened by the general policy of the law in regard to the first day of the week, and by the sentiment prevailing in Christian countries. ⁹⁴⁴ In law Sundays are generally excluded as days upon which the performance of any act demanded by the law is not required. They are held to be

dies non juridici. And in the Christian world Sunday is regarded as the "Lord's Day," and a holiday—a day of cessation from labor. By statute, enacted as far back as 1838, this day is made in Louisiana one of "public rest": Rev. Stats., sec. 522; Code of Practice, 207, 763.

This is the policy of the state of long standing and the framers of the constitution are to be considered as intending to conform to the same. They had the power to have written in the provisions of the organic law, stipulating the time in which the governor should return a bill with his objections, words which would have signified an intention to depart in such instance from the policy of the law, but it was not done. When they ordered merely that he must return the bill within five days after its presentation to him, they must be held to have meant days other than those of "public rest."

Whatever doubt may exist in the judicial mind as to the proper meaning to be given to the words used, it is, we think, safely resolved in favor of that construction sanctioned alike by the policy of the law and by the moral sentiment of the people.

The governor of the state has five days in which to consider a bill presented to him before he is compelled to return it with his objections, and in this computation of days he may exclude an intervening Sunday or other legal holiday. He vetoed the bill involved in this controversy on the 14th of July, which was timely, considering that the 10th of July was Sunday. As it was not thereafter passed by the two houses of the general assembly by the requisite constitutional vote, his veto to the contrary notwithstanding, the measure did not become a law, and the case of the relators falls.

In reaching the conclusions announced above, the fact that there is no constitutional prohibition against the general assembly sitting on Sundays has not been lost sight of. The general assembly has not heretofore generally held sessions on Sunday, and consideration of what would be the effect of a session on that day, in so far as making the same count, notwithstanding it was Sunday, in the computation ⁹⁴⁵ of the five days allowed the governor in which to return a bill with his objections, does not properly arise herein.

It is, therefore, unnecessary to determine the same now, and opinion is reserved.

Judgment affirmed.

Rehearing refused.

Time—Computation of.

Exclusion of First Day.—No uniform rule can be laid down as to whether, when computation is to be made from the time of an act done, the day on which the act is done is to be included or excluded. Whether the day on which an act is done or an event happens is to be included or excluded must depend upon the circumstances and reason of the case, so that the intention of the parties may be effected. Such a construction must be given as operates most to the ease of the parties entitled to favor, and by which rights are secured and forfeitures avoided.

Undoubtedly, the general tendency of the modern authorities is to establish the doctrine that when an act is to be done within a limited period from or after a particular time or event, the first day thus designated is excluded and the last day of the specified period is included. In *Lester v. Garland*, 15 Ves. Jr. 248, the master of the rolls said: "It is not necessary to lay down any general rule upon this subject, but, upon technical reasoning, I think it would be more easy to maintain that the day of an act done, or of an event happening ought, in all cases, to be excluded, than that it should in all cases be included." In *Taylor v. Brown*, 5 Dak. 335, 349, Mr. Justice Thomas said: "We do not claim that there is a uniformity of decisions of the courts of this country in regard to this question, but we admit that there is somewhat of conflict, but from a thorough examination of them we arrive at the following conclusion: That there is no absolute or well-settled rule of computation, but that courts will always adopt that construction which will uphold and enforce, rather than destroy, bona fide transactions and titles, and whenever it is necessary to prevent a forfeiture or to effectuate the clear intention of the parties, the dies a quo will be included, otherwise it will be excluded. We hold upon authority that the time within which an act is to be done shall be computed by excluding the first day and including the last": *Carothers v. Wheeler*, 1 Or. 194.

"As to how time shall be computed is a matter which has been litigated since the existence of the common law. In the computation of the period of time, the contest has generally been, which day shall be included and which excluded, but it would be difficult to extract any uniform rule from the jarring and conflicting decisions on the question. Our statute, to put all doubt at rest and insure certainty, has declared that the time within which an act is to be done shall be computed by excluding the first day and including the last. This is a statutory exposition of the common law, and necessarily leads to the exclusion of the first day": *Hahn v. Dierkes*, 87 Mo. 574. We apprehend that, at the present day, this rule exists, by force of statutory enactment, in a great number of the states of the American Union. "The tendency of the more recent decisions undoubtedly is to exclude the day of the act, unless to save

a forfeiture, or for some other special reason, it becomes necessary to reckon it inclusive. . . . It is not so important which rule is adopted, as it is that uncertainty on this subject should be avoided": *Blake v. Crowninshield*, 9 N. H. 304-307.

Among the cases which have adopted and which sustain the rule of construction that when the time within which an act is to be done is to be computed from and after a certain day, or date, the first day must be excluded in the computation of time, may be cited the following: *Hicks v. Blanchard*, 60 Vt. 673; *Hill v. Kerr*, 78 Tex. 213; *Handley v. Cunningham*, 12 Bush, 401; *Walker v. John Hancock etc. Ins. Co.*, 167 Mass. 188; *Bigelow v. Willson*, 1 Pick. 485; *Butbuck v. Holden*, 8 Cush. 233; *Fuller v. Russell*, 6 Gray, 128; *Bemis v. Leonard*, 118 Mass. 502, 19 Am. Rep. 470; *Kendall v. Kingsley*, 120 Mass. 94; *Seward v. Hayden*, 150 Mass. 158, 15 Am. St. Rep. 183; *Isaacs v. Royal Ins. Co.*, L. R. 5 Ex. 296; *Penn Plate Glass Co. v. Spring Garden Ins. Co.*, 189 Pa. St. 255, 69 Am. St. Rep. 810; *Nicklin v. Robertson*, 28 Or. 278, 52 Am. St. Rep. 790; *Graham v. Dequire*, 154 Mo. 88; *Backer v. Pyne*, 130 Ind. 288, 30 Am. St. Rep. 231; *Carothers v. Wheeler*, 1 Or. 195; *Jones v. Planters' Bank*, 5 Humph. 619, 42 Am. Dec. 471; *Williamson v. Farrow*, 1 Bail. 611, 21 Am. Dec. 492; *Kelly v. John*, 13 Ind. App. 579; *Brooklyn Trust Co. v. Hebron*, 51 Conn. 22; *Goode v. Webb*, 52 Ala. 452; *Protection Life Ins. Co. v. Palmer*, 81 Ill. 88; *Brown v. Chicago*, 117 Ill. 21; *Reigelsberger v. Stapp*, 91 Ind. 311; *Kerr v. Haverstick*, 94 Ind. 178; *Wood v. Commonwealth*, 11 Bush, 220; *White v. German Ins. Co.*, 15 Neb. 660; *White v. Haworth*, 21 Mo. App. 439; *Thorne v. Mosher*, 20 N. J. Eq. 257; *Beckwith v. Douglas*, 25 Kan. 229; *Ex parte Dean*, 2 Cow. 605, 14 Am. Dec. 521; *Owen v. Slatter*, 26 Ala. 547, 62 Am. Dec. 745; *Cressey v. Parks*, 75 Me. 387, 46 Am. Rep. 406; *McCulloch v. Hopper*, 47 N. J. L. 189, 54 Am. Rep. 146; *Weld v. Barker*, 153 Pa. St. 465; *Louisville etc. R. R. Co. v. Watson*, 90 Ala. 68; *State v. Weld*, 39 Minn. 426; *Spencer v. Haug*, 45 Minn. 231; *Paterson v. St. Thomas' Church*, 18 R. I. 349; *People v. Barry*, 93 Mich. 542; *Bates v. Howard*, 105 Cal. 173; *Deere v. Hucht*, 32 Mo. App. 153; *Brady v. Moulton*, 61 Minn. 185; *Bowen v. Julius*, 141 Ind. 310; *Judd v. Fulton*, 10 Barb. 117; *Anderson v. Baughman*, 6 Mich. 298; *Gorham v. Wing*, 10 Mich. 486; *Kimm v. Osgood*, 19 Mo. 60; *Rand v. Rand*, 4 N. H. 267; *Lorent v. South Carolina Ins. Co.*, 1 Nott & McC. 505; *Lang v. Phillips*, 27 Ala. 311; *Weeks v. Hull*, 19 Conn. 376, 50 Am. Dec. 249; *Windsor v. China*, 4 Me. 298; *Page v. Weymouth*, 47 Me. 238; *Cornell v. Moulton*, 3 Denio, 12; *Burr v. Lewis*, 6 Tex. 76; *Hall v. Cassidy*, 25 Miss. 48; *Pyle v. Maulding*, 7 J. J. Marsh. 202; *Arnold v. United States*, 9 Cranch, 104.

The rule announced above has been applied under a variety of circumstances and in numerous instances. Thus the time given by order of court in which to file a bill of exceptions is computed so as to exclude the first and include the last day: *Kelly v. John*, 13

Ind. App. 579; *Graham v. Dequire*, 154 Mo. 88. The same rule obtains as to a cost bill or exceptions thereto: *Nicklin v. Robertson*, 28 Or. 278, 52 Am. St. Rep. 790. In computing the time within which redemption may be made from a sheriff's or a judicial sale the day of the sale must be excluded: *Backer v. Pyne*, 130 Ind. 288, 30 Am. St. Rep. 231; *Jones v. Planters' Bank*, 5 Humph. 619, 42 Am. Dec. 471; *Northop v. Cooper*, 23 Kan. 432. The time of service of summons is to be computed by excluding the day of service and including the return day: *Reigelsberger v. Stapp*, 91 Ind. 311; *Kerr v. Haverstick*, 94 Ind. 178; *White v. German Ins. Co.*, 15 Neb. 660; *People v. Barry*, 93 Mich. 542. The same rule maintains as to publication of notice to nonresidents: *Beckwith v. Douglas*, 25 Kan. 229; *Page v. Weymouth*, 47 Me. 238. In the computation of time upon service of notice of trial, the day of service is excluded, and the first day of the term included: *State v. Weld*, 89 Minn. 426; *Anderson v. Baughman*, 6 Mich. 298. In computing the time between an application for a writ of habeas corpus and the sitting of the court, the day on which the application was made should be excluded: *Evans v. Bowers*, 13 Colo. 511. The day on which the cause of action accrues is excluded in computing time under the statute of limitations: *McCulloch v. Hopper*, 47 N. J. L. 189, 54 Am. Rep. 146; *Louisville etc. R. R. Co. v. Watson*, 90 Ala. 68; *Dingley v. McDonald*, 124 Cal. 90. The sixty days within which notice of a mechanic's lien must be filed are exclusive of the day on which the materials are placed on the land: *Paterson v. St. Thomas' Church*, 18 R. I. 349. In computing time on a lease for the term of one year from date the day of the date of the lease must be excluded: *Goode v. Webb*, 52 Ala. 452; or the day of the date of the lease may be included in computing the year, and the term expires at midnight on the preceding day in the next year: *Buchanan v. Whitman*, 151 N. Y. 253.

A clause in a fire insurance policy that it may be canceled by giving five days' notice of cancellation is governed by the general rule of excluding the first days and counting the days as legal days beginning and ending at midnight: *Penn Plate Glass Co. v. Spring Garden Ins. Co.*, 189 Pa. St. 255, 69 Am. St. Rep. 810. If a person whose life is insured is to make payment of an assessment within thirty days from the date of notice thereof, the day on which notice comes to him is to be excluded: *Protection Life Ins. Co. v. Palmer*, 81 Ill. 88. In computing the time when a note, not governed by the law merchant, payable a certain number of days after date, will become due, the rule is to exclude the day of date and include the day of payment: *Benson v. Adams*, 69 Ind. 353, 35 Am. Rep. 220; *Brown v. Jones*, 125 Ind. 375, 21 Am. St. Rep. 227; *Bowen v. Julius*, 141 Ind. 310; *Avery v. Stewart*, 2 Conn. 69, 7 Am. Dec. 240; *Woodbridge v. Brigham*, 12 Mass. 403, 7 Am. Dec. 85.

The day of the act from which a future time is to be ascertained is to be excluded from the computation, and this is applicable not

only to contracts, but also to wills and all other instruments: *Weeks v. Hull*, 19 Conn. 376, 50 Am. Dec. 249.

When a statute provides that it shall take effect and be in force from and after a named day, that day must be excluded from the operation of the act: *Handley v. Cunningham*, 12 Bush, 402.

"The word 'from,' in its literal and restricted sense, means 'exclusive,' but it may be used in a connection that means 'inclusive,' and it is quite frequently used in the latter sense, and therefore in construing it courts will take into consideration the context and subject matter, and construe it to mean either inclusive or exclusive, accordingly as it is influenced by its connection": *Taylor v. Brown*, 5 Dak. 349. The words "from the date" or "from and after the date" have the same meaning and are to be construed as they may best effectuate the presumed intention of the parties who employ them: *Oatman v. Walker*, 33 Me. 67; but in the absence of particular circumstances they are to be taken to exclude the day of date in the computation of time: *Weeks v. Hull*, 19 Conn. 376, 50 Am. Dec. 249; *Seekink v. Rehoboth*, 8 Cush. 371; *Smith v. Dickey*, 74 Tex. 61; *Sands v. Lyon*, 18 Conn. 18.

Forfeitures are abhorred at law, and in the computation of time from an act done, the day on which the act is done must be excluded, whenever such exclusion will prevent an estoppel or save a forfeiture: *Windsor v. China*, 4 Me. 298; *Flint v. Sawyer*, 30 Me. 226; *State v. Gasconade Co. Court*, 33 Mo. 102; *State v. Schnierle*, 5 Rich. 299; *Williamson v. Farrow*, 1 Bail. 611, 21 Am. Dec. 492. In cases of forfeiture, the day of the event after which in a specified number of days the forfeiture occurs must be excluded. And, in applying this doctrine to a quasi forfeiture, a court of equity will lean against the construction which favors a forfeiture: *Thorne v. Mosher*, 20 N. J. Eq. 257. And for this reason the first day will sometimes be included to save the forfeiture: *Blake v. Crowninshield*, 9 N. H. 304; *State v. Schnierle*, 5 Rich. 299.

Exclude Both Days.—Sometimes, in the computation of time, both the day of the beginning and termination of the term is excluded. Thus, if a contract provides that merchants shall have, to load a vessel, twenty days, "counting from the day of readiness until the day of dispatch," both such days are excluded: *Merritt v. Ona*, 44 Fed. Rep. 369. And in computing the time allowed for returning a justice's summons, the day of service and day of return are excluded: *Isabelle v. Iron Cliffs Co.*, 57 Mich. 120.

If notice is required for at least a certain number of days before an act is to be done, this means so many full days, and the day of the notice and the day of the act are both excluded from the computation: *Jones v. State*, 42 Ark. 93; *Steuart v. Meyer*, 54 Md. 454. Thus, notice of trial: *Robinson v. Foster*, 12 Iowa, 186; or to lay out a highway: *Coquard v. Boehmer*, 81 Mich. 445; or notice by advertisement: *Jackson v. Van Valkenburgh*, 8 Cow. 260. In computing the time of delivering a list of a jury, the day of delivery

and the day of trial must both be excluded: *State v. McLendon*, 1 Stew. 195.

A contract to deliver property between certain dates excludes both days beginning and ending the stipulated time: *Cook v. Gray*, 6 Ind. 335. A period of time defined as between two certain days does not include either of the terminal days: *Delaware etc. R. R. Co. v. Mehrhof*, 53 N. J. L. 205.

If a tender is required to be made a certain number of days before trial, the day of tender and the first day of the term of court should be excluded: *Willey v. Laraway*, 64 Vt. 568.

Exclude Either Day.—In *Gillespie v. White*, 16 Johns. 117, it was said that “it is the practice of this court, where any act is to be done within a specified number of days, to consider the day on which notice is given, and the day on which the act is to be done, the one inclusive and the other exclusive, without any particular designation that the one or the other shall be exclusive.” In another case in New York it was said, however, that “where reference is had to the day of date for computing time, I know of no decision in this state settling the point”: Per Chief Justice Savage in *Wilcox v. Wood*, 9 Wend. 346. “We take the law to be well settled, however, in matters of practice, where any particular number of days not expressed to be clear days is prescribed, the rule in regard to the computation of time is not to exclude both the day on which the notice is served and the day on which the act is to be performed, but to exclude the one and include the other”: Per Robinson, J., in *Walsh v. Boyle*, 30 Md. 267. To the same effect: *Stebbins v. Anthony*, 5 Colo. 348; *In re Senate Resolution*, 9 Colo. 632; *Jones v. Planters’ Bank*, 5 Humph. 619, 42 Am. Dec. 471; *Owen v. Slatter*, 26 Ala. 547, 62 Am. Dec. 745; *Knoxville Mills Co. v. Lovinger*, 83 Ga. 563; *Meredith v. Chancey*, 59 Ind. 466.

Include First Day.—The old rule that where computation is to be made from the time of an act done, the day on which the act is done should be included, still maintains in some jurisdictions, notably Kentucky, Georgia, and South Carolina. Thus, in *Chiles v. Smith*, 13 B. Mon. 461, the court said: “The rule in regard to the computation of time seems to be, that when the computation is to be made from an act done, the day on which the act is done must be included, because since there is no fraction in a day, the act relates to the first moment of the day in which it is done.” To like effect, *Handley v. Cunningham*, 12 Bush, 401; *Wood v. Commonwealth*, 11 Bush, 220. The same rule is uniformly maintained in Georgia: *Jones v. Smith*, 28 Ga. 43; *English v. Ozburn*, 59 Ga. 392; *Blitch v. Brewer*, 83 Ga. 336, 337; *Peterson v. Georgia R. R. Co.*, 97 Ga. 798; *Jones v. Kern*, 101 Ga. 309. In computing the time of a sheriff’s advertisement, the day it commenced and the day of sale may both be counted: *Manning v. Dove*, 10 Rich. 395. In computing the time for the limitation of an action against a person from the day of his coming of age, the day he attains his ma-

jority is to be counted. In computing his majority, the day of his birth is to be included: *Ross v. Morrow*, 85 Tex. 172; *Phelan v. Douglass*, 11 How. Pr. 193. A contrary rule is maintained in *Gile v. Atkins*, 93 Me. 223, 74 Am. St. Rep. 341, in computing the age of a colt, and there the last day of the term is excluded, as it is held that a colt foaled on July 12th is six months old on the succeeding January 11th.

Sunday, When Excluded.—If a period of time fixed by a decree or order of court or by statute for an act to be accomplished closes on Sunday, the general rule is to exclude that day in the computation of time and to allow all of the following Monday for the accomplishment of such act: *Kipp v. Fitch*, 73 Minn. 65; *Spencer v. Haug*, 45 Minn. 231; *Johnson v. Merritt*, 50 Minn. 303; *State v. May*, 142 Mo. 135; *Robinson v. Templar Lodge*, 114 Cal. 41; *California Imp. Co. v. Quinchard*, 119 Cal. 87; *People v. Rose*, 167 Ill. 147; *Chicago v. Vulcan Iron Works*, 93 Ill. 222; *Hicks v. Nelson*, 45 Kan. 47, 23 Am. St. Rep. 709; *Gage v. Davis*, 129 Ill. 236, 16 Am. St. Rep. 260; *Backer v. Pyne*, 130 Ind. 288, 30 Am. St. Rep. 231; *Street v. United States*, 133 U. S. 299; *Monroe Cattle Co. v. Becker*, 147 U. S. 47-56; *Porter v. Pierce*, 120 N. Y. 217; *State v. Stuckey*, 78 Mo. App. 533; *Nickles v. Kendrick*, 76 Miss. 334; *In re Senate Resolution*, 9 Colo. 632; *Edmundson v. Wragg*, 104 Pa. St. 500, 49 Am. Rep. 590; *Cressey v. Parks*, 75 Me. 387, 46 Am. Rep. 406; *Gibbon v. Freel*, 65 How. Pr. 273; *Hodgson v. Banking House*, 9 Mo. App. 24; *Bacon v. State*, 22 Fla. 46; *English v. Williamson*, 34 Kan. 212. If the last day for redemption from a forced sale of any nature, such as sheriff's, mortgage, or tax sale, falls on Sunday, this day is excluded in the computation of time, and redemption may be made the next day: *Backer v. Pyne*, 130 Ind. 288, 30 Am. St. Rep. 231; *English v. Williamson*, 34 Kan. 212; *Hicks v. Nelson*, 45 Kan. 47, 23 Am. St. Rep. 709; *Gage v. Davis*, 129 Ill. 236, 16 Am. St. Rep. 260; *Gage v. Bailey*, 100 Ill. 530; *Porter v. Pierce*, 120 N. Y. 217. The contrary rule is maintained in Massachusetts: *Haley v. Young*, 134 Mass. 364; *Cooley v. Cook*, 125 Mass. 406; and in Colorado: *Valles v. Brown*, 16 Colo. 462. Under a constitutional provision, that any unsigned bill shall become a law if not filed by the governor, with his objections in the office of the secretary of state within ten days after the adjournment of the legislature means ten days exclusive of Sundays: *People v. Rose*, 167 Ill. 147. Sunday is generally excluded in the court as one of the days of the term of a court: *Michie v. Michie*, 17 Gratt. 109; *Read v. Commonwealth*, 22 Gratt. 924; *Qualter v. State*, 120 Ind. 92. A hearing by the court in Bank, however, cannot be granted after the expiration of thirty days after decision in department, although the last day falls on Sunday: *Adams v. Dohrmann*, 63 Cal. 417. But if an appeal bond is required to be given within a designated number of days from a certain date, and the last day falls upon Sunday, it must be excluded from the count: *Nickles v. Kendrick*,

76 Miss. 334. Generally, if a contract matures on Sunday, that day is to be excluded and the next day is the one on which the performance is to be exacted. Thus, if the premium on a policy of life insurance falls due on Sunday, it may be paid on the following Monday, even if the insured dies on such Sunday: *Hammond v. American Mut. Life Ins. Co.*, 10 Gray, 303. If a non-negotiable note falls due on Sunday, a tender on the following Monday is good: *Avery v. Stewart*, 2 Conn. 69, 7 Am. Dec. 240; *Sands v. Lyon*, 18 Conn. 18; *Barrett v. Allen*, 10 Ohio, 426. And if a note or contract which has no days of grace falls due on Sunday, demand for payment cannot lawfully be made until the following day: *Salter v. Burt*, 20 Wend. 205, 32 Am. Dec. 530; *Post v. Garrow*, 18 Neb. 682; *First Nat. Bank v. McAllister*, 33 Neb. 646; *Hirshfield v. Fort Worth Nat. Bank*, 33 Tex. 452, 29 Am. St. Rep. 660; *Stebbins v. Leowolf*, 3 Cush. 137. When the time for the performance of a contract falls on Sunday, a compliance on the following day is a sufficient performance: *Stryker v. Vanderbilt*, 27 N. J. L. 68. Thus, a tenant under a lease reserving a monthly rental, payable in advance on the first of the month, is entitled to the second day of the month to make payment, when the first day falls on Sunday: *Byers v. Rothschild*, 11 Wash. 296. If a note is entitled to days of grace, and the last of these days falls on Sunday, the note is payable and demand for payment may lawfully be made on the Saturday preceding: *Salter v. Burt*, 20 Wend. 205, 32 Am. Dec. 530; *West v. Lee*, 50 How. Pr. 314; *Lindenmuller v. People*, 33 Barb. 569; *Homes v. Smith*, 20 Me. 264; *Fleming v. Fulton*, 6 How. (Miss.) 473; *Farnum v. Fowle*, 12 Mass. 89, 7 Am. Dec. 35.

It is a general rule that where an act is required to be done in any certain number of days, after or before a fixed time, Sunday is to be excluded in the computation of days unless the period exceeds seven days. Thus, where the governor of a state is given three days in which to sign bills after the adjournment of the legislature, an intervening Sunday must be excluded in computing the three days: *Stinson v. Smith*, 8 Minn. 366; *People v. Hatch*, 33 Ill. 149; *Farwell v. Mathels*, 48 Fed. Rep. 363. If an act is required by statute to be done within any number of days less than seven, Sunday is to be excluded in the computation: *Simonson v. Durfee*, 50 Mich. 80; *Caupfield v. Cook*, 92 Mich. 626; *First Nat. Bank v. Williams Milling Co.*, 110 Mich. 15. Thus, the twenty-four hours allowed to a party to claim an appeal must be hours exclusive of Sunday: *McIniffe v. Wheelock*, 1 Gray, 603; and the twenty-four hours allowed after judgment before execution can issue do not include Sunday: *Penniman v. Cole*, 8 Met. 496. If publication of notice of process is required for six days, publication on Sunday is not to be counted if that day intervenes: *Scammon v. Chicago*, 40 Ill. 146; *McChesney v. People*, 145 Ill. 615. If four days are allowed in which to take an appeal, Sunday must be excluded: *Neal*

v. Crew, 12 Ga. 100. The same rule applies to a motion for a new trial or in arrest of judgment, which must, under the statute, be made within four days: National Bank v. Williams, 46 Mo. 17; Lewis v. Schwerin, 15 Mo. App. 342. If notice is required to issue to the owner of intoxicating liquors seized under a search warrant in twenty-four hours after the seizure, Sunday must be excluded in the computation of the time specified: Commonwealth v. Certain Intoxicating Liquors, 97 Mass. 601. If a statute imposes a penalty on a railroad company for allowing freight received for shipment to remain unshipped for five days, an intervening Sunday must be excluded in counting the five days: Branch v. Wilmington etc. R. R. Co., 77 N. C. 347; Keeter v. Wilmington etc. R. R. Co., 86 N. C. 346.

In *Cressey v. Parks*, 75 Me. 387, 46 Am. Rep. 406, it was held that if a statute prescribes that property seized for taxes shall be kept four days, and then sold unless such taxes are paid, the day of seizure is excluded, intervening Sundays are included, and the property must be sold on the fourth day, unless that falls on Sunday, and then on the next day.

Sunday is sometimes excluded in computing time, even when the period is more than seven days, because it is evident from the context that in fixing a specified time working days were meant: National Bank v. Williams, 46 Mo. 17; Neal v. Crew, 12 Ga. 100. It has been held that if a state constitution limits the session of the legislature to fifty days, this means working days, and Sundays must be excluded in computing the fifty days: *Ex parte Cowert*, 92 Ala. 94; *Moog v. Randolph*, 77 Ala. 597.

Sunday, When Included.—When the period of time within which a particular act may or may not be done exceeds a week, Sunday is included in the computation of time as a general rule, but if it is less than a week Sunday must be excluded. In the following cases the rule is maintained that in the computation of time for the doing of acts, intervening Sundays are included, if the period in question exceeds seven days: *Cunningham v. Mahan*, 112 Mass. 58; *Cooley v. Cook*, 125 Mass. 406; *Matthews v. Arthur*, 61 Kan. 455; *The Mary B. Baird*, 97 Fed. Rep. 977; *Haley v. Young*, 134 Mass. 364-366; *American Tobacco Co. v. Strickling*, 88 Md. 500; *Kellogg v. Carrico*, 47 Mo. 157; *Hermann v. United States*, 66 Fed. Rep. 721; *Rasmussen v. People*, 155 Ill. 70; *Gordon v. People*, 154 Ill. 664; *St. Joseph v. Landis*, 54 Mo. App. 315; *Martin v. Sunset Teleph. Co.*, 18 Wash. 260; *Hanover Fire Ins. Co. v. Shrader*, 89 Tex. 35, 59 Am. St. Rep. 25; *Van Laer v. Kansas Triphammer Brick Works*, 56 Kan. 545; *Yocum v. First Nat. Bank*, 144 Ind. 272; *Heard v. Phillips*, 101 Ga. 601; *Merritt v. Gate City Nat. Bank*, 100 Ga. 147.

It has been maintained that when the limitation of time within which an action must be commenced ends on Sunday, that day must be included in the count, and the action cannot be commenced the next day. In such case the action should be com-

menced the preceding Saturday: *Williams v. Lane*, 87 Wis. 152-159; *Vailes v. Brown*, 16 Colo. 462; *Allen v. Elliott*, 67 Ala. 432. In computing the ten days within which the order of the collector of customs for the return of goods to the public stores must be served upon the importer, if the tenth day falls on Sunday, that day cannot be excluded, and the service of such order on the Monday following is not sufficient: *Shefer v. Magone*, 47 Fed. Rep. 872; *Hermann v. United States*, 66 Fed. Rep. 721.

If an act is to be done by a certain day, which happens to be Sunday, or within a certain time, which ends on Sunday, it has been held that performance must be on Saturday preceding as the last day, unless the act is one which may properly be done on Sunday: *Keating v. Serrill*, 5 Daly, 282; *Allen v. Elliott*, 67 Ala. 432. Thus, if a party contracts to deliver certain property during a certain month, and the last day of that month falls on Sunday, a delivery on the first day of the next month does not satisfy the contract: *Brooklyn Oil Refinery v. Brown*, 38 How. Pr. 449. And an act required to be done within twenty-four hours after notice must be done on Sunday included in such term or period, if the circumstances are such as to require it, and it may lawfully be done on that day: *Casey v. Viall*, 17 R. I. 348.

Holidays.—If the last day of a period allowed a person in which to do an act falls upon a holiday, that day is excluded in the computation of time, and he has the whole of the next legal day in which to do the act: *Catherwood v. Shepard*, 30 La. Ann. 677; *In re Senate Resolution*, 9 Colo. 632. It has been held that in an extension of time allowed for filing a transcript on appeal intervening holidays should be counted: *Pierce v. Cushing*, 33 La. Ann. 401. Payment of a note cannot be demanded on a holiday so as to charge the indorser, but if that be the last day of grace demand must be made on the previous day: *Sheldon v. Benham*, 4 Hill, 129, 40 Am. Dec. 271.

Fractions of Day—When Disregarded.—It may be stated as a general rule, that in the legal computation of time there are no fractions of a day, and the day on which an act is done or an event happens must be entirely excluded or included, unless substantial justice requires that fractions of a day should be computed. It may be added, however, that this rule of law is now known chiefly by its exceptions, and that when private rights depend upon it courts may inquire into the hour at which an act was done or a decree entered, or an attachment laid, or a title accrued, or the like.

For general purposes, the law regards a day as a continuous period of twenty-four hours commencing at midnight as the unit of measure, and takes no notice of its fractions. Hence, the time so designated is, in general, the whole of the day on which the event occurs or the act is done. This general rule that the law will not regard fractions of a day has been enforced in the following cases: *Lang v. Phillips*, 27 Ala. 311; *Fears v. Merrill*, 9 Ark. 559;

50 Am. Dec. 226; *Denver v. Pearce*, 13 Colo. 383; *In re Senate Resolution*, 9 Colo. 632; *Miner v. Goodyear Co.*, 62 Conn. 410; *Fisher v. Hanover Nat. Bank*, 64 Fed. Rep. 832; *Faulds v. People*, 66 Ill. 210; *Levy v. Chicago Nat. Bank*, 158 Ill. 88; *Fowell v. Hollweg*, 81 Ind. 158; *Vogel v. State*, 107 Ind. 374; *Bemis v. Leonard*, 118 Mass. 505, 19 Am. Rep. 470; *Kimm v. Osgood*, 19 Mo. 60; *Hughes v. Patton*, 12 Wend. 234; *Blydenburgh v. Cotheal*, 4 N. Y. 418; *Columbia Tp. Road v. Haywood*, 10 Wend. 422; *Duffy v. Ogden*, 64 Pa. St. 240; *Penn Plate Glass Co. v. Spring Garden Ins. Co.*, 189 Pa. St. 255, 69 Am. St. Rep. 810; *Mitchell v. Schoonover*, 16 Or. 211, 8 Am. St. Rep. 288; *Williamson v. Farrow*, 1 Bail. 611, 21 Am. Dec. 492; *Murfree v. Carmack*, 4 Yerg. 295, 26 Am. Dec. 232; *Plowman v. Williams*, 3 Tenn. Ch. 181; *Haines v. State*, 7 Tex. App. 33; *Linhart v. State*, 33 Tex. Cr. Rep. 504; *Matter of Welman*, 20 Vt. 653; *Neale v. Utz*, 75 Va. 480; *Small v. Wakefield*, 84 Iowa, 533.

In the computation of time prescribed by constitutional or statutory provisions for the performance of official acts the general rule is, that fractions of a day are not to be noticed, and each fraction is to be considered in the computation as a full day: *In re Senate Resolution*, 9 Colo. 632; *Griffin v. Forrest*, 49 Mich. 309; *Wimer v. Goodyear Mfg. Co.*, 62 Conn. 410; *Pulling v. People*, 8 Barb. 384; *Phelan v. Douglass*, 11 How. Pr. 193; *Portland Bank v. Maine Bank*, 11 Mass. 204; *Matter of Welman*, 20 Vt. 653. "The general rule is that the law knows no fractions of a day. The effect is to render a day a sort of indivisible period, so that any act done in the compass of it is no more referable to any one portion of it than to any other portion of it; and where two acts are done upon the same day, they will, as a general thing, be regarded in law as done at the same time. It follows that, where a case turns upon the question as to which of two acts was done first, the party having the burden of proof fails in merely showing that both were done on the same day": *Levy v. Chicago Nat. Bank*, 158 Ill. 88-103. The law does not, in general, regard fractions of a day except in cases where the hour itself is material. For the purpose of defeating a judgment rendered by a court of general jurisdiction, the legal representative of a deceased party cannot be heard to allege that on the day of the rendition of such judgment, but at an hour previous thereto, his intestate died: *Mitchell v. Schoonover*, 16 Or. 211, 8 Am. St. Rep. 282. It is a general rule that in judicial proceedings fractions of a day are not regarded, and that such proceedings take effect from the earliest period of the day upon which they originated, and came in force: *Alrichs v. Thompson*, 5 Harr. 432; *Murfree v. Carmack*, 4 Yerg. 270, 26 Am. Dec. 232; *Revill v. Claxon*, 12 Bush, 558; *Blydenburgh v. Cotheal*, 4 N. Y. 418; *Jones v. Porter*, 6 How. Pr. 286. Generally, unless the law provides for fractions of a day, all judgments entered on the same day are regarded as entered at the same time and as creating liens equal in point of priority:

Rockhill v. Hanna, 15 How. 189; *Cook v. Dillon*, 9 Iowa, 407, 74 Am. Dec. 854; *Bruce v. Vogel*, 38 Mo. 100; *Waterman v. Haskin*, 11 Johns. 228; *Neff v. Barr*, 14 Serg. & R. 171; *Long's Appeal*, 23 Pa. St. 299; *Boyer's Estate*, 51 Pa. St. 432, 91 Am. Dec. 129; *Ladley v. Creighton*, 70 Pa. St. 490. In the service of process or of notices or of pleadings, fractions of a day are disregarded: *Westbrook Mfg. Co. v. Grant*, 60 Me. 88, 11 Am. Rep. 181; *Columbia Tp. Road v. Haywood*, 10 Wend. 422; *Hughes v. Patton*, 12 Wend. 234; *Speer v. State*, 2 Tex. App. 246.

In cases of hiring, fractions of a day, for the purposes of computation, are to be reckoned as a whole day: *Regina v. St. Mary*, 1 Bl. & B. 827; and when the law provides a per diem compensation for the time necessarily devoted to the duties of an office, the officer is entitled to this daily compensation for each day on which it becomes necessary for him to perform any substantial official duty, regardless of the time occupied in its performance: *Smith v. Jefferson Co.*, 10 Colo. 22.

Compensation of the porters of the state senate is fixed at a certain per diem by statute, and the word "day" as used in that statute covers whatever portion of the twenty-four hours the senate chooses to remain in session on any one day: *Robinson v. Dunn*, 77 Cal. 473, 11 Am. St. Rep. 297.

In cases of a variety of instruments by which one party obligates himself to the performance of a certain duty, as to pay money within a certain time, the party thus bound has until the last moment of the last day to deliver himself from the obligation: *Taylor v. Jacoby*, 2 Pa. St. 497, 45 Am. Dec. 615; *Price v. Tucker*, 5 La. Ann. 514; *Osborn v. Moncure*, 3 Wend. 170; *Williamson v. Farrow*, 1 Bail. 618, 21 Am. Dec. 492; *Phelan v. Douglass*, 11 How. Pr. 193.

Fractions of Day Recognized.—The better and more reasonable rule or exception to the rule above considered is, that where the justice of the case requires it, fractions of a day must be reckoned in the computation of time. This is the rule adopted by the supreme court of the United States, where it is held that when it is necessary to the justice of the case and to determine conflicting rights, courts of justice will take cognizance of the fractions of a day: *Louisville v. Savings Bank*, 104 U. S. 469; *National Bank v. Burkhardt*, 100 U. S. 686; *Taylor v. Brown*, 147 U. S. 640; *Neale v. Utz*, 75 Va. 480.

In all cases where conflicting rights are claimed to exist in consequence of different things having been done on one and the same day, it becomes indispensable, in order to do justice between the parties, to ascertain the precise time when the events occurred, and for this purpose fractional parts of a day may be inquired into: *Clute v. Clute*, 4 Denio, 244; *Matter of Richardson*, 2 Story, 577. The rule that in law there are no divisions or fractions of a day does not prevail in questions concerning merely the acts of parties, when it becomes necessary to distinguish and ascertain which of several

persons has a priority of right, as where a bond and release are executed on the same day or the like: *Matter of Welman*, 20 Vt. 653. The legal fiction that there is no smaller fraction of time than a day is generally confined to judicial and other public proceedings, and does not apply to transactions between parties whose priority of right becomes a question of fact: *Maynard v. Esher*, 17 Pa. St. 226. In construing a statute which, as between different acts, gives a preference to that which is first done, the rule that fractions of a day are not recognized is disregarded: *Lang v. Phillips*, 27 Ala. 311. Fractions of a day are generally not considered in legal proceedings, and the day that a judgment or deed is dated will, as a general rule, include the whole of that day, but if two persons claim the same tract of land from a common source, by different conveyances, executed on the same day, the time of day such conveyances were executed may be proved for the purpose of showing who has the better right: *Murfree v. Carmack*, 4 Yerg. 270, 26 Am. Dec. 232. Fractions of a day are considered in determining the priority of judgment liens arising from registration, under a statute which, as between the different acts of registration, gives priority to the one first done: *German Security Bank v. Campbell*, 99 Ala. 249, 42 Am. St. Rep. 55; *Mitchell v. Schoonover*, 16 Or. 211, 8 Am. St. Rep. 282; *Knowlton v. Culver*, 2 Pinn. 243, 52 Am. Dec. 156. The law will regard fractions of a day when the exact time is material, and will take notice of the hour of the day at which time an act is done, when priority, even for an instant, works an advantage: *Plowman v. Williams*, 3 Tenn. Ch. 181-183; *Maine v. Gilman*, 11 Fed. Rep. 214; *Hoyt v. San Francisco etc. R. R. Co.*, 87 Cal. 610; *Leavenworth Coal Co. v. Barber*, 47 Kan. 29; as the time of the delivery of a deed for registration: *Metts v. Bright*, 4 Dev. 173, 32 Am. Dec. 683; or of the appointment of one of two receivers: *People v. Central City Bank*, 35 How. Pr. 428; or in determining the priority of lien between a judgment entered and a mortgage recorded the same day: *Goetzinger v. Rosenfeld*, 16 Wash. 392; *German Security Bank v. Campbell*, 99 Ala. 249, 42 Am. St. Rep. 55; or in determining priority of attachments levied the same day: *Tufts v. Carradine*, 3 La. Ann. 430. In estimating the amount of damage caused by obstructing a highway, the jury may consider fractions of a day: *Ferris v. Ward*, 9 Ill. 499.

If a statute provides that it shall take effect "from and after its publication," the precise time of the day of its publication or taking effect may be shown when an act is done on that day and the hour of publication of the statute affects such act: *Leavenworth Coal Co. v. Barber*, 47 Kan. 29.

If, in order to do justice between parties, it becomes necessary to ascertain the exact time of a marriage or death, fractions of a day may be computed: *Matter of Richardson*, 2 Story, 578; *Lanning v. Pawsen*, 38 Pa. St. 480; *Patterson's Appeal*, 96 Pa. St. 93. If

time is material to a contract, the exact hour of performance may be shown: *Grosvenor v. Magill*, 37 Ill. 239.

If a conveyance of land is made on the same day on which a judgment lien attaches, proof of the time when the judgment was rendered or docketed, and of the time of the execution of the conveyance may be received to determine the priority: *Duke v. Clark*, 58 Miss. 465, 59 Miss. 576; *Hoppock v. Ramsey*, 28 N. J. Eq. 413; *Long's Appeal*, 23 Pa. St. 301; *Small's Appeal*, 24 Pa. St. 400; *Boyer's Estate*, 51 Pa. St. 432, 91 Am. Dec. 129.

A Year, in the computation of time, unless from the context or otherwise a different intent is to be gathered, means a year consisting of twelve calendar months: *Owen v. Slatter*, 26 Ala. 549, 62 Am. Dec. 745; *Fretwell v. McLemore*, 52 Ala. 145; *Engleman v. State*, 2 Ind. 91, 52 Am. Dec. 494. The meaning of the term "year," however, must be determined from the connection in which it is used, and which will carry into effect the intention of the parties: *Knobe v. Baldrige*, 73 Ind. 54; *Thornton v. Boyd*, 25 Miss. 598. If applied to matters of revenue, there is a presumption in favor of referring the word "year" to the fiscal year: *Glasgow v. Rowse*, 43 Mo. 479. If a contract is to sell all fruits which may be raised during a certain year on a farm, and a portion of the purchase price is to be paid "when the crop is taken off at the end of the year," such end of the year means the end of the fruit season: *Brown v. Anderson*, 77 Cal. 238. And it has been held that when an officer is elected to fill the term of one year, he is entitled to hold until the next election: *Paris v. Hiram*, 12 Mass. 262.

Month.—It is a universal rule in this country that when the term "month" is used, either in statutes, agreements, or judicial proceedings, and there is nothing to indicate a different meaning, it must be construed to mean a calendar month and not a lunar month: *Bacon v. State*, 22 Fla. 46; *Guaranty Trust Co. v. Buddington*, 27 Fla. 215; *Hopkins v. Chambers*, 7 T. B. Mon. 257; *Economy Feed etc. Co. v. Lamprey Boiler etc. Co.*, 65 Fed. Rep. 1000; *Gasquet v. Crescent City Brewing Co.*, 49 Fed. Rep. 493; *Williamson v. Farrow*, 1 Bail. 611, 21 Am. Dec. 492; *Leffingwell v. White*, 1 Johns. Cas. 99, 1 Am. Dec. 97; *Kelly v. Gilman*, 29 N. H. 385, 61 Am. Dec. 648; *McGinn v. State*, 46 Neb. 427, 50 Am. St. Rep. 617; *Gross v. Fowler*, 21 Cal. 393; *Sprague v. Norway*, 31 Cal. 174; *Hardin v. Major*, 4 Bibb, 104; *Bartol v. Calvert*, 21 Ala. 42; *Sheets v. Selden*, 2 Wall. 177; *Union Bank v. Forrest*, 3 Cranch C. C. 218; *Shapley v. Garey*, 6 Serg. & R. 539; *Pyle v. Maulding*, 7 J. J. Marsh. 202; *Commonwealth v. Chambre*, 4 Dall. 143; *Glenn v. Smith*, 17 Md. 260; *Avery v. Pixley*, 4 Mass. 460; *Parsons v. Chamberlin*, 4 Wend. 512; *Strong v. Birchard*, 5 Conn. 357; *People v. Mayor, etc.*, 10 Wend. 393-395; *Hosley v. Black*, 28 N. Y. 438-444; *Mitchell v. Woodson*, 37 Miss. 567; *Brewer v. Harris*, 5 Gratt. 285. When a month is referred to in legal proceedings, it must be under-

stood to be of the current year, unless, from the connection, it is apparent that another is intended: *Tillson v. Bowley*, 8 Me. 163. The term "month," when used in contracts or deeds, must be construed, if the parties have not themselves given it a definition, and there is no legislative provision on the subject, to mean calendar and not lunar months: *Sheets v. Selden*, 2 Wall. 177. The same rule applies to statutes and judicial proceedings: *Williamson v. Farrow*, 1 Bail. 611, 21 Am. Dec. 492; *Gross v. Fowler*, 21 Cal. 393; *Sprague v. Norway*, 31 Cal. 174. If parties contract for the performance of an act during the first half of any month containing thirty-one days, they contract that it shall be performed by noon of the sixteenth day of that month: *Grosvenor v. Magill*, 87 Ill. 239. A calendar month is to be computed not by counting days, but by looking at the calendar. It terminates with the day numerically corresponding to the day of its commencement less one in the following month. Thus if a term of three months begins with the ninth day of April, it ends at midnight on the eighth day of July. The rule is here applied to the time when a statute goes into effect: *McGinn v. State*, 46 Neb. 427, 50 Am. St. Rep. 617. Under the old common-law rule the word "month," when applied to mercantile obligations, was construed to mean a calendar month, but when it was applied to other contracts or transactions, it was construed to mean a lunar month, or twenty-eight days, unless the parties expressly indicated a contrary intention, and formerly some of the states of the United States adopted the common-law rule, although it is now obsolete in all of them: *Ellis' Case*, 8 N. J. L. 232; *Leffingwell v. White*, 1 Johns. Cas. 99, 1 Am. Dec. 97; *Loring v. Halling*, 15 Johns. 119; *Stackhouse v. Halsey*, 3 Johns. Ch. 74; *Rives v. Guthrie*, 1 Jones, 84; *Redmond v. Glover*, Dud. (Ga.) 107.

A *Week*, in the computation of time, usually means a period of time of seven calendar days' duration, without any reference to the particular day on which that period commences to run, unless such day is fixed by the agreement of the parties or the subject matter of the transaction: *State v. Yellow Jacket etc. Min. Co.*, 5 Nev. 430; *Evans v. Job*, 8 Nev. 322; *In re Tyson*, 13 Colo. 482; *Knowlton v. Knowlton*, 155 Ill. 158; *Wilson v. Northwestern Mut. L. Ins. Co.*, 65 Fed. Rep. 38; *Johnson v. Hill*, 90 Wis. 19; *Hollister v. Vanderlin*, 165 Pa. St. 248, 44 Am. St. Rep. 657; *Derby v. Modesto*, 104 Cal. 515.

A *Day*, in the computation of time, has been defined to be that period of time consisting of twenty-four hours, between any midnight and the midnight following: *Derby v. Modesto*, 104 Cal. 515; *Zimmerman v. Cowan*, 107 Ill. 631, 47 Am. Rep. 476; *Kane v. Commonwealth*, 89 Pa. St. 522, 33 Am. Rep. 787; *Haines v. State*, 7 Tex. App. 33; *People v. Hatch*, 33 Ill. 137; *Helphenstine v. Vincennes Nat. Bank*, 65 Ind. 589, 32 Am. Rep. 86. The technical rule of law making part of a day a whole day does not apply to the days of a legislative session so as to make a session of a limited number of days which began at noon expire with the end of the

calendar day, but the last legislative day will expire at noon, making each of the limited number of days full days of twenty-four hours: *White v. Hinton*, 3 Wyo. 753.

Solar or Standard Time.—The only standard of time in the computation of a day or hours of a day recognized by law is the meridian of the sun, and a legal day begins and ends at midnight, the mean time between meridian and meridian, or twelve o'clock post meridian. An arbitrary and artificial standard of time fixed by persons in certain lines of business cannot be substituted at will in a certain locality for the standard recognized by the law: *Henderson v. Reynolds*, 84 Ga. 159; *Searles v. Averhoff*, 28 Neb. 668; *Ex parte Parker*, 35 Tex. Cr. Rep. 12. The presumption is that common solar time is that relied upon when there is nothing to show that a different method of measuring time has been in general use: *Searles v. Averhoff*, 28 Neb. 668.

Meaning of Various Words.—As a general rule, the word "until" appearing in a statute as well as in a contract must be taken in the computation of time as implying an intention to exclude the day to which it refers: *People v. Walker*, 17 N. Y. 502; *Bunce v. Reed*, 16 Barb. 347; *Ryan v. State Bank*, 10 Neb. 524; *Willey v. Laraway*, 64 Vt. 566. When time is given until a certain day to file a bill of exceptions, it may be filed on or before that day: *Newport News Co. v. Thomas*, 96 Ky. 613. But the above rule must yield when it is manifest from the statute or the contract of the parties that it was the intention to include it: *Kendall v. Kingsley*, 120 Mass. 94; *Ryan v. State Bank*, 10 Neb. 524. And the word "until" may, in a contract or a law, have an exclusive or inclusive meaning depending upon the subject, transaction or connection about or in which it is used: *Webster v. French*, 12 Ill. 302.

Generally, if an act is required to be done "within" a certain number of days, the day of the date is to be excluded in the computation: *Bemis v. Leonard*, 118 Mass. 502, 19 Am. Rep. 470; *Grant v. Paddock*, 30 Or. 312. The word "between," when it refers to a period of time from one day or month or year to another, excludes both dates. Thus between two days is exclusive of both: *Weir v. Thomas*, 44 Neb. 507, 48 Am. St. Rep. 741; *Delaware etc. R. R. Co. v. Mehrhof Bros. Co.*, 53 N. J. L. 205. If a person is required to perform an act "before" a certain date, that date is excluded, and to perform the act on such date is too late: *Alston v. Falconer*, 42 Ark. 114; *Elsev v. Falconer*, 42 Ark. 117. If a person is given "to" a certain day to do an act, the word "to" includes that day, and he may perform the act on such day: *Conawingo etc. Co. v. Cunningham*, 75 Pa. St. 138; *Clark v. Ewing*, 87 Ill. 344. The word "forthwith" means within the twenty-four hours thereafter: *Champlin v. Champlin*, 2 Edw. Ch. 328.

NEW ORLEANS v. GRAFFINA.

[52 Louisiana Annual, 1082.]

MUNICIPAL CORPORATIONS—ORDINANCES REGULATING MARKETS.—The state has the right to regulate markets for the sale of produce, and it may delegate that power to the municipalities in which such markets are situated, and in such case ordinances adopted for that purpose are not ultra vires, and must be sustained when not unreasonable, discriminative, nor oppressive.

MUNICIPAL CORPORATIONS—POWER TO REGULATE PRODUCE MARKETS.—The right in a municipality to establish a public market necessarily covers the right to prevent the establishing of private markets, and the right to prevent the sale of market commodities within the police regulations of the city for sanitary purposes and for convenience.

MUNICIPAL CORPORATIONS—POWER TO REGULATE PRODUCE MARKETS.—A city having power to establish public markets has power to prevent the establishing of private markets, and to prohibit the sale of provisions and articles of daily consumption by peddlers.

MUNICIPAL CORPORATIONS—ORDINANCES—PRESUMPTION.—It is presumed that an ordinance passed by a city under its power to regulate produce markets is reasonable and not oppressive.

Stafford & Lambert, for the appellant.

J. J. McLaughlin, assistant city attorney, and S. L. Gilmore, city attorney, for the appellee.

1083 BREAUX, J. Defendant prosecutes this appeal from a judgment condemning him to pay a fine for keeping a private market within the market limits, and condemning him to pay an additional fine for selling vegetables within those limits, and another fine for peddling within market limits. In default of payment, he is ordered to be imprisoned for a stated number of days.

The affidavit made against the appellant, by the city authorities, sets out the ordinances he is charged with having violated, and the particular acts of the defendant complained of as being violative of those ordinances. It appears that the defendant keeps a fruit stand at the corner of Jackson avenue and Magazine streets, where he sells fruit and vegetables in small quantities to consumers.

The place at which he keeps this fruit stand is within two thousand one hundred feet of the nearest public market. This is within the limits prohibited by an ordinance of the council. Defendant assails the ordinances of the council he is charged with having violated, on a number of grounds, chiefly because

they are ultra vires, unreasonable, and discriminative. The ordinances attacked by the defendant are not ultra vires.

The state has the right to regulate the markets, and it may also delegate that power to the municipal corporation in which the markets sought to be regulated are situated. Regulations regarding markets are indispensable in cities; and ordinances adopted for that purpose are not ultra vires when the municipality is authorized, as in this case, to regulate them. The right to establish a public market necessarily covers or embraces the right to prevent the establishing of private markets, and the right to prevent the sale of market commodities within the police regulations of a city for sanitary purposes and for convenience. The object, primarily, is to enforce the inspection laws more strictly, and to prevent the sale of articles or provisions that are not sound.

The enforcement of inspection laws would be attended with great difficulty and annoyance, if all articles of food were sold at any place chosen by the venders of such articles. Such regulations have always been held permissible.

Not long since, this court had occasion to consider a similar question regarding the very ordinance now at hand, and it held that the ¹⁰⁸⁴ municipality had the power to establish public markets, and to prevent the establishing of private markets, or prohibit the sale of provisions and articles of daily consumption by peddlers: *State v. Namias*, 49 La. Ann. 618, 62 Am. St. Rep. 657.

This subject received consideration in another case, in which it was held that the right to establish public markets is accompanied by the right to prevent the establishing of private markets within certain prescribed limits: *State v. Gisch*, 31 La. Ann. 544. It follows that the ordinances attacked by the defendant are not amenable to the charge of being ultra vires.

But defendant contends that if they are not ultra vires, then, that they are unreasonable. The business of the retail fruit dealer is the only subject before us for decision. The right to carry on that business, within designated limits, may be made subordinate to the rights of public and other markets without violating the requirement that an ordinance shall be reasonable. All retail fruit dealers are brought within the terms of the ordinance. The municipality having the power to regulate the markets, the court will presume the ordinance to be reasonable until the contrary is shown.

Defendant's next complaint is, that it is discriminative and oppressive. In support of that complaint he avers that if section 34 of ordinance 4155 forbids the keepers of fruit from selling anything other than fruit, that it is discriminative, as the prohibition is limited to fruit dealers, exclusively. It may be that the council, from a sanitary point of view, had reasons to exclude fruit dealers. There is no evidence before us regarding the necessity vel non of adopting an ordinance prohibiting fruit dealers from selling vegetables, but we do not take it that the prohibition is as limited as defendant contends. The ordinances under which public and private markets are established look to the sale of vegetables at these markets, and do not seem to sanction their sale at all hours, and at all places. It is ordained that they shall be sold at certain places, and under such conditions as defendant has not observed. This ordinance was before us for interpretation not long since in a case in which this court said, that "under the terms of the law referred to above, we are unable to see wherein any of the rights of defendants were infringed. They were dealers in vegetables, which the ordinance required should not be sold, if in the market limits, within market hours. They were not excluded from the sale of their produce in the markets": 1085 State v. Sarra-dat, 46 La. Ann. 700.

In that view, defendant has no ground whereon to urge the complaint of discrimination, because all vegetables must be sold in the markets. If his neighbors and others violate the ordinance, it affords him no ground of defense on this point. The law is general. In enacting the ordinance, the council, as we interpret it, made what they deemed an exception to the general rule, and ordained that there should be no interference with those carrying on the business of fruit venders, provided it was limited to the sale of fruit only. In this we do not find that there was discrimination.

We decline to pass upon the questions of fact pressed upon our attention, as they properly come up for consideration on the application for a writ of certiorari.

It is therefore adjudged, ordered, and decreed that the sentence and judgment appealed from is affirmed, to the extent that the defendant was condemned to pay two dollars and fifty cents for offering for sale and selling vegetables within the market limits, and in default of the payment thereof, imprisoned for the stated number of days.

It is further adjudged, ordered, and decreed that in all other respects the questions herein, being of facts, are left open to be decided in case No. 13,430, on relator's application for a writ of certiorari. Appellee to pay costs.

Rehearing refused.

MUNICIPAL REGULATION OF MARKETS.—A municipal corporation has power to fix by ordinance the places at which food commodities, in quantities adapted to the daily wants of the community, may be sold: *State v. Davidson*, 50 La. Ann. 1297, 69 Am. St. Rep. 478. An ordinance forbidding the sale of fruits, vegetables, and other articles of food within six squares of the public markets by peddlers is a valid exercise of the police power by a city: *State v. Namias*, 49 La. Ann. 618, 62 Am. St. Rep. 657. See, further, on this subject the note to *Jacksonville v. Ledwith*, 23 Am. St. Rep. 581-584.

WILLIAMS v. POPE MANUFACTURING COMPANY.

[52 Louisiana Annual, 1417.]

TRESPASS—TRANSITORY ACTION.—The cause of action on a tort or trespass is transitory and follows the offending party, whether a corporation or a natural person, into any jurisdiction wherein he may be found, and the right of action being personal to the complainant, he may bring it in any court that he may select.

DAMAGES—CONFLICT OF LAWS.—A claim for damages *ex delicto* arising from a tort or trespass upon the person of a married woman while temporarily sojourning in one state, and whose matrimonial domicile is in another state, cannot be considered as community property acquired in the former state; and if she has full capacity to institute suit in her own name and recover judgment for such damages in the courts of the state of her domicile, she also has capacity to sue therefor in her own name in the state where the injury is received.

ACTION BY MINOR—WHO MAY MAINTAIN.—If the father of a minor child has disappeared and abandoned the matrimonial domicile, the mother may appear in court in behalf of such minor and assert the rights of the latter.

Pierson & Pierson, for the appellant.

W. C. McLeod and Buck, Walshe & Buck, for the appellee.

1417 **WATKINS, J.** This is a supplement to suit of same title, which was disposed of by this court, recently: See *Williams v. Pope Mfg. Co.*, 51 La. Ann. 186.

From the record it appears that a motion was filed in the district court "suggesting that the former decree of this court, dismissing this suit on the fourth exception filed by the defendant, has been annulled, avoided, and reversed by the final judg-

ment of the supreme court, rendered on appeal thereto, and ordering this cause to be reinstated on the docket of this court, to be proceeded with according to the views herein expressed and the law"; and an order to that effect was made—a copy of the opinion of the supreme court being therewith filed.

Thereupon, the case was reinstated on the docket of the district ¹⁴¹⁸ court, and proceeded with according to law; and upon a trial thereof, the remaining exceptions of the defendant were sustained, and the suit again dismissed.

The reasons of the district judge for so doing are in writing, and were filed in the court a qua, and a judgment dismissing the suit was, thereupon, entered; and from that judgment the plaintiff prosecutes this, her further appeal.

For the purpose of a clear understanding and appreciation of this case, it will be necessary to make a few extracts from the plaintiff's petition to which the exceptions of the defendant were directed, and which are substantially as follows, to wit:

The plaintiff, Mrs. Emily J. Williams, wife of Charles H. Williams, a resident of and domiciled in the state of Mississippi, sues herein, individually, "and for the use and benefit of her daughter, Florence Williams, aged fourteen years, her husband being absent in the state of Mississippi, and his present whereabouts therein unknown to her."

She, thereupon, represents that the defendant, a corporation, as she is advised, under the laws of the state of Connecticut, with its principal place of business and general offices and factories in the city of Hartford, in that state, with a branch office and place of business at No. 1757 St. Charles avenue, in the city of New Orleans, where it is now operating and conducting its business, of the manufacture, sale, and hire of bicycles, within and under the laws of this state, through its officers, agents, and employes in charge thereof, "is justly and legally indebted unto your petitioner in the sum of ten thousand dollars, individually, and for the further sum of ten thousand dollars for the use and benefit of her said minor daughter, for this, to wit:

"For libel, slander, public defamation of character, malicious prosecution, and false imprisonment of your petitioner and her said minor daughter, committed against them in the city of New Orleans, on Sunday, about April 4, 1897, by the said Pope Manufacturing Company, its officers, agents, and employes, and for which said corporation is responsible and liable to them in damages.

"Your petitioner alleges that while she and her said minor daughter were quietly and in an orderly manner passing along Napoleon avenue, a public thoroughfare of this city, they were followed and pursued by two men, strangers to them, but who they afterward learned were F. and Harold Bayhi, father and son, agents and employes of said Pope ¹⁴¹⁹ Manufacturing Company, acting as detectives and spotters for said company. That said two men overtook them on said public avenue, at or near the corner of Carondelet street, where they rudely accosted them, and forcibly arrested and detained them without cause therefor, and notwithstanding neither of them had, nor claimed to have, nor exhibited any right or authority for their action, they, then and there, in the presence of those passing along said avenue, publicly charged and accused your petitioner and her said daughter with having committed the felonious and infamous offense of grand larceny of two bicycles from the said Pope Manufacturing Company of the value of one hundred and twenty dollars.

"That they were forcibly detained by said two men until the arrival of a policeman, Corporal O'Neal [by whom] they were carried in custody through the public streets of said city to the Seventh precinct station [wherein] they were incarcerated until about 8:30 P. M. the same evening, when they were transferred to the Second precinct station, and therein imprisoned and kept closely confined until about 1:30 o'clock the following evening, when, through the efforts of their minister and other friends, they were admitted to bail, and discharged from custody.

"Petitioner further alleges that an officer of the corporation, representing and acting for and on behalf of said corporation, joined and co-operated with said named employes in making said charge and arrest of your petitioner and her daughter, and in their subsequent imprisonment and detention. That said accusation and charge were entirely false and unfounded as to them, and were made without any cause therefor; and your petitioner and her daughter earnestly protested their entire innocence, and begged and implored said parties to desist from their course, and to allow them to go without further molestation; but that their appeals and entreaties were received with contempt, and no further satisfaction accorded to them than the statement that they, said men, were acting for a company fully responsible and capable of paying all damages which they might inflict."

Petitioner avers that although she and her daughter were first arrested about 5:30 o'clock on Sunday, no formal charge or affidavit was made, nor warrant issued for their arrest, until 1:30 P. M. the following day. In the meanwhile, they were unlawfully imprisoned and detained by procurement of said representatives of said corporation, acting for the corporation, and which, as your petitioner believes, is responsible ¹⁴²⁰ for the wanton and unlawful imprisonment of herself and her daughter, and which was done in a malicious and cruel manner, notwithstanding the evidence of their innocence was made manifest to said parties.

She represents that one of said parties, notwithstanding he was fully informed of all of the aforesaid facts, made an affidavit on the part of said corporation, before the judge of the first recorder's court, "in which he falsely and corruptly charged your petitioner and her little daughter with having committed the felonious crime of breach of trust and embezzlement of two bicycles, alleged to have been hired from said corporation on March 26, 1897, as set forth in said affidavit."

That shortly after said affidavit was made, and they had been released on bond, "they were called upon by said recorder, and notified that said charges had been withdrawn, and that they were discharged therefrom."

Petitioner alleges "that at the time that said charges were preferred, and of their arrest and imprisonment, they were persons of good moral character and reputation, professed Christians, members of the Baptist church, and in full enjoyment of their Christian faith and church fellowship."

That the said charges of grand larceny and breach of trust and embezzlement, as above set out, were libelously and slanderously made, without probable cause therefor; and that they were thereby wantonly and maliciously libeled and slandered in their good name, character, and reputation.

That in their arrest and subsequent detention and incarceration, they were unlawfully, falsely, and maliciously prosecuted, without any probable cause or justification whatever, and greatly to their injury and damage. That by law they are entitled to sue for and recover, not only compensation for all the said losses and injuries sustained, but, also, in addition thereto, to recover exemplary and punitive damages therefor.

The petitioner alleges "that she was married in 1873 in the state of Mississippi, where she and her husband continuously resided, and which is their exclusive matrimonial domicile, and

her said husband is absent from the state of Louisiana, with his residence and domicile in the state of Mississippi, which is also her domicile; and that as to their matrimonial relations, as well as their acquisitions and property rights, they are subjected to and governed by the laws of the state of Mississippi.

¹⁴²¹ That by the laws of said state she is separate in property from her said husband, with the sole right and authority to administer separately her own personal affairs, property rights, and acquisitions, and entitled to acquire, hold, use, and dispose of the same from the control or marital influence of her said husband, with the right and capacity to sue and be sued personally and without joinder or authority of her husband as to all matters relating to or affecting her personal rights or property interests. That by the laws of said state the damage herein sued for and sustained by her arose and accrued to her separately, and not in whole or in part to her husband. That the laws of her matrimonial domicile govern and control her right to separately sue for the damages herein claimed, which were sustained by her while in Louisiana."

She further shows "that her said husband abandoned her in 1893, after six children were born of their marriage, and disappeared from the matrimonial domicile, and has since absented himself therefrom; that she is not now aware of the precise locality in Mississippi in which he may be found; and that by the laws of Louisiana, she is entitled to exercise all the rights of her husband with respect to the education and administration of the property rights of their children. That by said law, she, being now present in the state of Louisiana, is entitled to sue herein for her said daughter, Florence, and to claim for her use and benefit the damages herein alleged.

"Wherefore, she prays to be authorized by the court to institute this suit and stand in judgment, and for judgment against said corporation for the sum of ten thousand dollars in her own right, and for the further sum of ten thousand dollars for the use and benefit of her daughter, Florence." The foregoing petition was met in its incipency by several exceptions.

In our previous opinion we examined and reversed the judgment of the district court sustaining the defendant's fourth exception, which is to the effect that "there is an improper and illegal joinder of parties plaintiff; that there are two distinct actions and demands presented, by and for two different plaintiffs, cumulated in the same petition, and one or the other should be dismissed."

Having made a statement of the cause of action and quoted the foregoing exception, our opinion says: "For the purpose of the trial of the exception of misjoinder and improper ¹⁴²² cumulation, the capacity of Mrs. Williams to sue individually and on behalf of her minor daughter must be admitted. This leaves to be determined the plain question whether a cause of action arising in behalf of Mrs. Williams, growing out of the tort of defendant, and a cause of action arising in behalf of her daughter, growing out of the same tort, may be cumulated in one and the same suit. We think it may. For the purpose of the suit, the mother is assimilated to the character of tutrix of her daughter. Common wrong is represented to have been inflicted on the two at one and the same time."

Inasmuch as that exception judicially avers "that there are two distinct actions and demands prosecuted by and for two different plaintiffs, cumulated in the same petition, and one or the other should be dismissed," the argument in favor of the theory that neither of them can be maintained appears to be somewhat illogical, in view of the fact that this court has already decided that both were correctly brought and properly cumulated in one petition, for the reason that the cause of each action was the same fault of the defendant, and the acts of the defendant a common wrong to both mother and daughter.

That exception, in terms, admits as much, because it is premised by the statement that, "if the above exceptions should be overruled and the court hold that either or both of said causes or action or demands are properly brought, and by the proper party, the defendant pleads for further exception, etc."; and by that averment it distinctly bases said fourth exception upon the hypothesis that his preceding exceptions were untenable.

If we are now to examine the preceding exceptions and affirm the judgment of the district court sustaining them and dismissing the plaintiff's suit, our present decree would, in effect, be in exact opposition to its prior judgment overruling the fourth exception, and maintaining the suit. In our view, for all practical purposes, such is the purport of the judgment appealed from.

But, accepting the situation as it is now presented on the record before us, what are the legal questions for determination? 1. That the plaintiff has no right or interest in her own name to prosecute this suit and stand in judgment herein, under the laws of this state; "and she cannot, by alleging that her husband's domicile is in ¹⁴²³ another state, invoke the benefit of

the laws of such state to the practical nullification of all laws of this state regulating the marital relations [of the spouses]; [because] foreign laws are not permitted to be operative in this state when they are inconsistent with the general spirit and policy of our own laws on the subject matter involved"; 2. That the allegations of the plaintiff leave in doubt the present domicile of her husband; so that if her theory be admitted to be possible, or correct in law, she does not allege, with sufficient certainty, the facts under which the court is requested to adjudicate her rights as "a citizen of the state of Mississippi"; 3. Petitioner has no right or authority, in fact or law, to bring and prosecute the demand for the use and benefit of her minor child; 4. That the judge's authorization of the plaintiff was inadvertently granted upon an insufficient showing in law; 5. That the allegations of the petition are too vague and indefinite; and particularly in that the demands for the damages claimed are neither itemized nor apportioned between the mother and daughter.

These exceptions are directed at the allegations of the petition, and must be determined thereby, with a view to the law governing same; and in thus determining them, no matter of fact which is well pleaded in the petition can be denied or gainsaid.

1. In the petition it is alleged that plaintiff was married to her husband in the state of Mississippi, in 1873; that she and her husband have since continuously resided there; and that their exclusive matrimonial domicile is in that state. That the matrimonial relations of herself and her husband, as well as their acquisitions and property rights, are subject to and governed by the laws of the state of Mississippi. That by the laws of said state, she is separate in property from her husband, with the sole right and authority to administer separately her own personal affairs, property rights and acquisitions, and entitled to acquire, hold, use, and dispose of the same free from the control or marital influence of her husband; and that she is, under the laws of that state, invested with the right and capacity to sue personally and without the joinder or authority of her husband, as to all matters relating to or affecting her personal rights, or property interests.

1424 It is, also, specifically alleged "that, by the laws of said state, the damage herein sued for and sustained by her, arose and accrued to her separately, and not in whole or in part to her husband; and that the laws of her matrimonial domicile

govern and control her right to separately sue for the damages claimed, which were sustained by her while in Louisiana."

The foregoing full and complete allegations: 1. As to her matrimonial domicile being now, and having always been, in the state of Mississippi; 2. That her property rights and acquisitions are subject to and governed by the laws of that state; 3. That by the laws of that state she is separate in property from her husband, with the sole and exclusive authority to separately administer her own personal affairs and property; 4. That she is, by the laws of that state, invested with the right and capacity to sue personally without the assistance or authority of her husband, in respect to all matters relating to her personal rights and property interests; 5. And that, under the laws of that state, the damages herein sued for and sustained by her, arose and accrued to her separately, and entitled her to personally sue for and recover same—certainly leave no room for complaint on the score of inadequacy of allegation.

Taking the averments as they are made, the plaintiff has stated a complete cause of action and right of action, unless as the exceptions aver: 1. That she possesses no right of action in her own name under the laws of Louisiana; 2. That she cannot be allowed to invoke the laws of Mississippi, and by so doing practically nullify the laws of Louisiana regulating the marital relations of the spouses.

Or, in other words, the question for consideration is whether: 1. The damages sued for by the plaintiff in her own right, as having been sustained by her while temporarily in Louisiana, and which accrued to her separately, are subject to and to be controlled by the law of her matrimonial domicile; 2. Or to be governed or controlled by the laws of the state of Louisiana which regulate the matrimonial relations and property rights of married persons who reside outside of its limits but acquire property rights within its limits.

The solution of that question must, of necessity, depend upon whether the legal situs of plaintiff's claim for damages *ex delicto* arising from a tort, or quasi offense, is in Louisiana or Mississippi; for if same be in Louisiana, where the wrong is alleged to have been committed, ¹⁴²⁵ the law of her matrimonial domicile does not control or govern her right of action, and vice versa.

Our law provides that "all property acquired in this state by nonresident married persons . . . shall be subject to the

that the mere assent of the husband is sufficient. The action must be brought by the husband: *Holmes v. Holmes*, 9 La. 350; *Cowand v. Pulley*, 9 La. Ann. 12; *Barton v. Kavanaugh*, 12 La. Ann. 332; *Cooper v. Cappell*, 29 La. Ann. 213. This would be the law if the marriage had been contracted and the domicile of the parties to the marriage had been within this state. The Civil Code, article 2400, subjects 'nonresident married persons' to the same provisions of law 'as regulate the community of acquets and gains between citizens of this state,' so far as relates to 'all property acquired in this state.' It is not necessary to give any technical meaning to the word 'property' as used by the legislature. The object of the legislature, namely, to subject nonresident citizens, is manifest, and leaves no doubt but that the word 'property' included not only land and chattels, real and personal, but also choses in action."

It must be confessed that the tenor of that decision supports the view the district judge entertained, but, in our opinion, it is of such far-reaching importance and scope that an examination should be made of the jurisprudence of this court and that of the states in which the common law prevails for the purpose of ascertaining its applicability and correctness.

At common law, a proceeding like this is styled a transitory action of trespass, which follows the tortfeasor into any jurisdiction into which he may go, and who may be taken wherever found; and the right of action is equally permissible against a corporation as against a private individual.

In the case of *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, the Mississippi court had such an action under consideration. The action was instituted by Lawrence, a citizen of Illinois, in the circuit court of Claiborne county, Mississippi, against the Pullman ¹⁴²⁸ Company, an Illinois corporation, for fifty thousand dollars damages for personal injuries alleged to have been inflicted by a colored porter upon him while he was on one of its sleeping-cars, in which he was being transported from Chicago, Illinois, to New Orleans, Louisiana—said injuries having been inflicted upon him while the train was in the state of Illinois, at the hour of 10 o'clock P. M., after leaving Chicago in the afternoon of that day; and the service having been made on the conductor of the sleeping-car while at Port Gibson, Mississippi, on the line of the Illinois Central Railroad.

On that state of facts, the court said: "The defendant first pleaded to the jurisdiction of the court, because the wrong and

injury complained of occurred wholly in the state of Illinois, and not in the state of Mississippi, and because the plaintiff and defendant were at the time of the bringing of the suit, and still are, citizens of and residents in the same state of Illinois. To this plea to the jurisdiction, plaintiff demurred, and the demurrer was sustained, and leave was given the defendant to plead to the merits, and the defendant then filed the general issue, etc."

In this situation, and to the cause of action thus stated, the court announced the law to be:

"It is assigned for error that the court below erred in sustaining plaintiff's demurrer to the plea to the jurisdiction filed by the defendant. Until the hearing of the able and exhaustive oral argument of appellant's counsel in support of this assignment, we had supposed there was, in our state, no ground left for dispute that in transitory actions, whether in tort or on contract, our courts were wide open to any suitor, resident or non-resident, against his adversary, whether resident or nonresident, whether a natural person or an artificial one, regardless of where the right of action occurred, if only the courts had jurisdiction of the subject matter, and could obtain jurisdiction of the party, either by a voluntary appearance or by service of process.

"We are aware that there is some divergence of opinion on this subject between the courts of last resort of this country, and that apparent authority can be found for holding that a foreign corporation resident in one state may not be sued in another state by a resident of the first state on a cause of action arising in the first state. . . . But in many states, and among them our own, the rule we first announced has been firmly established by repeated adjudication. The ¹⁴²⁹ rule was first expressly declared in our own state in the case of New Orleans etc. R. R. Co. v. Wallace, 50 Miss. 244. This was an action brought by Wallace against a railroad company, a foreign corporation, in one of the courts of this state, for the recovery of damages for injuries sustained by him in a collision of trains in the state of Louisiana. The court said then on this very question: 'Corporations are artificial persons existing only in contemplation of law. They must dwell in the place of their creation, and cannot migrate to another state. But they are liable to be sued like natural persons in transitory actions arising ex contractu or ex delicto, in any state where legal process can be had. . . . In transitory actions, foreign private corporations, like natural persons, may be sued anywhere where the

court can obtain jurisdiction of the corporation either by legal service of process, or its appearance by attorney.' ”

The court then states that the same question was decided by that court in Chicago etc. R. R. Co. v. Doyle, 60 Miss. 977, the action being brought in Mississippi against a foreign corporation for an injury done in the state of Tennessee.

In deciding that case, the court, speaking through its chief justice, said: “The right of action for damages for killing a husband by the statute of Tennessee may be asserted in the courts of this state, because a right of the coincidence of the statutes of the two states on this point; and independently of this, because a right of action created by the statute of another state, of a transitory nature, may be enforced here when it does not conflict with the public policy of this state to permit its enforcement.”

A similar case is stated by that court in Illinois Cent. R. R. Co. v. Crudup, 63 Miss. 291, the injury having been inflicted in a collision of trains in Tennessee. The supreme courts of the United States, of Minnesota, of New York, and Kentucky held the same view. In the still later case of McMaster v. Illinois Cent. R. R. Co., 65 Miss. 264, 7 Am. St. Rep. 653, the same proposition was maintained—the injury having been inflicted in the state of Louisiana.

The case of Knight v. West Jersey R. R. Co., 108 Pa. St. 250, 56 Am. Rep. 200, was an action of trespass for the recovery, in a court of Pennsylvania, of damages for the death of the wife and mother of the plaintiffs ¹⁴³⁰ by a railroad accident that happened in New Jersey, and the court said: “The general rule is, as to personal torts which give a right of action at common law, that the action may be brought wherever the wrongdoer may be found, and jurisdiction of his person may be obtained. . . . The statute of another state has no extraterritorial force, but rights under it will always, in comity, be enforced, if not against the policy of the laws of the forum. In such cases, the law of the place where the right was acquired . . . will govern as to the right of action, while all that pertains merely to the remedy will be controlled by the law of the state where the action is brought”: Citing Herrick v. Minneapolis etc. Ry. Co., 31 Minn. 11, 23 Am. Law Reg. 26, and the case of Dennick v. Railroad Co., 103 U. S. 11.

The court further held:

“That action was brought in a state court in New York for recovery of damages under the statute of New Jersey which im-

poses liability therefor upon a party by whose wrongful act, neglect or default death ensues.

"The accident which caused the death of the plaintiff's husband occurred in the latter state. After remarking that the right of action depended solely upon the statute of New Jersey, and that it was a civil action to recover damages for a civil injury, the court said: 'It is difficult to understand how the nature of the remedy, or the jurisdiction of the court to enforce it, is in any manner dependent on the question whether there is a statutory right or a common-law right. Whenever, by either the common law or the statute of the state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of the parties. . . . A party legally liable in New Jersey cannot escape that liability by going to New York. If the liability to pay money was fixed by the law of the state where the transaction occurred, is it to be said it can be enforced nowhere else because it depended on statute law and not upon common law? It would be a very dangerous doctrine to establish that in all cases where the several states have substituted the statute for the common law, the liability could be enforced in no other state, but that where the statute was enacted and the transaction occurred.'

"Obviously, that case affirms that a personal liability created by the ¹⁴⁸¹ statute of another state *will be enforced according to the course of procedure in the state where the defendant may be found*. It was no less important to consider the point than it would have been in the state court had the cause not been removed. . . .

"We think the weight of the recent and better considered adjudications in this country decidedly favors the application of the same rule to all transitory actions for injuries to persons or property, whether recognized by the common law, or created by statute, *to meet new exigencies of modern life*, unless such statute is contrary to the policy of the laws of the state where the action is brought. *The claim of comity, on which the rule is founded, is as urgent in one case as the other.* . . .

"As a general rule, neither citizenship nor residence is requisite to entitle a person to bring suit in Pennsylvania. A court having jurisdiction of the subject may acquire jurisdiction of the person by lawful service of its process. If a defendant were not liable to answer in a civil action in any state where he may be found, he could easily evade the service of process." (Our italics.)

In *Burns v. Grand Rapids etc. R. R. Co.*, 113 Ind. 169, the Indiana court said:

"When the railway company wrongfully caused the death of William Burns in the state of Michigan, we have seen that a right of action, under the statutes of that state, accrued to his personal representatives, to recover civil damages for the benefit of those to whom his personal property became distributable. It is a well-established principle that *rights which have accrued under the laws of a foreign state are treated as valid rights everywhere; and by means of this principle cognizance is taken of extraterritorial laws, and of facts extraterritorial, when these laws and facts have conferred rights or imposed obligations upon persons who are within the jurisdiction of the court.* (Italics ours.)

"The application of this principle requires that the injuries prescribed must have given a right of action under the laws of the place where the default or neglect occurred. A civil right of action is acquired under the laws of the state where the injury was inflicted, or a civil liability incurred in one state may be enforced in any other in which the party in fault may be found, according to the course of procedure in the latter state": Citing, among others, the following authorities: *Dennick v. Railroad Co.*, 103 U. S. 11; *Leonard v. Columbus etc. Nav. Co.*, 1482 84 N. Y. 48, 38 Am. Rep. 491; *Central R. R. Co. v. Swint*, 73 Ga. 651; *McLeod v. Connecticut etc. Ry. Co.*, 58 Vt. 727; *Boyce v. Wabash Ry. Co.*, 63 Iowa, 70, 50 Am. Rep. 730.

Again: "Actions for the recovery of damages for personal injuries are transitory in their nature, and arise out of the supposed violation of rights which in contemplation of law are not local, nor confined to the state where the right accrued. Such actions have always been regarded as transitory in character; and although the injury and the right of action may have accrued in a foreign state, it is now settled by an overwhelming weight of authority that the jurisdiction of courts to entertain and enforce the right is not dependent upon whether it is of a statutory or common-law origin, provided the enforcement of the right in no way infringes upon or contravenes the policy of the state in whose jurisdiction the remedy is sought."

The case of *Eingartner v. Illinois Steel Co.*, 94 Wis. 70, 59 Am. St. Rep. 859, was an action in a court of Wisconsin to recover for personal injuries suffered by the plaintiff in a rolling mill in the city of Chicago—the plaintiff being at the time and now a citizen of Illinois, and the defendant being an Illinois corporation.

The court said: "This is an action to recover damages for injuries to the person. It is, therefore, purely a transitory action, and the principle that the courts of this state have jurisdiction to entertain such an action, although the cause arose in Illinois, and the parties are residents of Illinois, is unquestioned: *Curtis v. Bradford*, 33 Wis. 190. A court of this state would even have jurisdiction of a transitory action of this nature where it arose in a foreign country, or on the high seas, and both parties to the action were aliens, provided jurisdiction of the person could be obtained": *Gardner v. Thomas*, 14 Johns. 134; *Johnson v. Dalton*, 1 Cow. 543, 13 Am. Dec. 564; *Great Western Ry. Co. v. Miller*, 19 Mich. 312.

On considering the principles of jurisprudence announced in the foregoing decisions, and applying same to the law of the state of Mississippi as it is alleged to be, we have referred to the statute of that state relating to the matter at issue, in connection with the decisions, as we do customarily, for the purpose of tracing the connection between the two, and as a necessary means of determining the question of law that had been propounded in this controversy touching a material distinction ~~1433~~ which is claimed to exist between the laws and jurisprudence of Louisiana, and the laws and jurisprudence of the state of Mississippi, with relation to plaintiff's ownership and control of the right of action for the recovery of damages against defendant. And, having examined same, we have found it to be as follows, viz.: "Married women are fully emancipated from all disability on account of coverture; and the common law, as to the disabilities of married women and its effect on the rights of property of the wife, is totally abrogated; and marriage shall not impose any disability or incapacity on a woman as to the ownership, acquisition, or disposition of property of any sort, or as to her capacity to make contracts, and do all acts in reference to property which she could lawfully do if she were not married; but every woman not married or hereafter to be married, shall have the same capacity to acquire, hold, manage, control, use, enjoy, and dispose of all property *real and personal, in possession or expectancy*, and to make any contract in reference to it, and to bind herself personally; *and to sue and be sued with all the rights and liabilities incident thereto, as if she were not married*" (our italics): Miss. Ann. Code 1892, sec. 2289.

Unquestionably, the plaintiff would be recognized as having a right of action in a Mississippi court under that statute, if the corporation could be found and cited there, notwithstanding

the injuries complained of were inflicted in Louisiana; and it is claimed that, under the comity which prevails between the states—and particularly between two states that are so intimately associated as Louisiana and Mississippi are—she ought to be recognized as having a right of action in the courts of Louisiana, independently of its community laws, as she might have in the courts of Kentucky, Tennessee, or Illinois. For, if a citizen of Illinois may go into a court of Tennessee or Mississippi, with an action for damages which were inflicted in Louisiana, he ought to be accorded a similar right of action in Louisiana courts for injuries inflicted in Mississippi.

The legal deduction from this jurisprudence is that the cause of action on a tort or trespass is transitory, and follows the offending party into any jurisdiction wherein he may be found; and, further, that the right of action being personal to the complainant, he may bring it in any court that he may select.

Having thus dealt with plaintiff's right of action, as same would stand in a Mississippi court under the statement of the law as given in ¹⁴³⁴ her petition with regard to what her legal rights as a citizen of Mississippi are, and as that statement has been verified by the statute, we must now determine what is the legal status of her claim against the defendant, under the law of Louisiana; that is to say, whether it is to be viewed, in a general sense, as governed by the *lex loci contractus*, and, therefore, an asset of a matrimonial community *pro hac vice* which exists in this state by virtue of the law. For, if this be the case, the plaintiff is without a right of action in the courts of this state in her own name, notwithstanding she might have such a right of action in the courts of Mississippi.

2. As we have already seen, the judge *a quo* entertained the opinion and decided: 1. That the situs of a personal obligation for purposes of suit is at the domicile of the debtor, and not at that of the creditor; 2. That "the damages to the wife in the present case fall into the community as property acquired within the state of Louisiana, damages to persons coming well within the meaning of property or rights acquired."

The two foregoing propositions are one and the same for all practical purposes—the latter depending upon the former—for, if the legal situs of the demand in damages which is declared upon is in Louisiana, it necessarily falls into the legal community which exists under its laws, notwithstanding the husband and wife were citizens of Mississippi at the time it sprang into existence.

It has been frequently held that the community law of this state is a real and not a personal statute; and the decisions on the subject refer to the opinion of our predecessors in the important and conspicuous case of *Saul v. His Creditors*, 5 Mart., N. S., 569, 16 Am. Dec. 212, as the original source from which that doctrine emanated, in which the court, after a most extensive exploration of Spanish and French statutes and decisions interpreting them, and from which our statute is derived, made the following statement, viz.: "We think the state and condition of both husband and wife are *fixed by the marriage, in relation to everything but property, independent of this law; and as it regulates property alone, it is not a personal statute. . . . We consider it real.*" (Our italics.)

¹⁴³⁵ And, considering our community law, a real statute which deals with property that is situated in the state, and not with the personal rights or condition of the spouses, the court makes this observation, viz.: "On the subject before us, the writers who treat of it . . . agree in stating that a *real statute*, that is, one which regulates property within the limits of the state where it is in force, controls *personal* ones, which follow a man wherever he goes; indeed it has been . . . admitted that where the *personal statute of the domicile* is in opposition to a *real statute of situation*, the real statute will prevail." (Our italics.)

In *Cole v. Executors*, 7 Mart., N. S., 41, 18 Am. Dec. 241, the court made approving reference to *Saul v. His Creditors*, 5 Mart., N. S., 569, 16 Am. Dec. 212, and observed: "But we there determined that the law, or, to adopt the language of the jurisprudence of the continent of Europe, the statute, which regulated the rights of a husband and wife, was real, not personal, that it regulated things, and subjected them to the laws of the country in which they are found. . . . Viewing the statute as real, it is the thing on which it operates that gives it application, not the residence of the person who may profit by the rule it contains."

In *Dohan v. Murdock*, 41 La. Ann. 494, the court had under consideration the question of the legal effect of the statute of 1852, now article 2400 of the Revised Civil Code, as appertaining to property acquired in Louisiana by married persons who resided in Mississippi, and in the course of its opinion said: "The conjugal partnership thus provided for is exclusively a creature of the civil law, and can result only from express legislative will; hence it could exist only under circumstances especially provided for."

So it is from this standpoint that we are to commence our investigation of the question of the status of the plaintiff's demand for damages *ex delicto* arising from a wrongful act of the defendant; and whether it is to be considered as "property acquired" under our community law considered as a real statute.

We have made a careful examination of our own reports and have made the following extracts from the cases cited:

In *Ford v. Ford*, 2 Mart., N. S., 574, 14 Am. Dec. 201, it was held that the common law of England, unless altered by local laws, is the governing rule of decision in the state of Mississippi.

¹⁴³⁶ In *Arendell v. Arendell*, 10 La. Ann. 566, it was held that the right of the husband to slaves owned by the wife at the time of their marriage in Alabama must be determined by the laws of Mississippi, where the spouses intended to fix their matrimonial domicile and where they subsequently resided. And in so deciding the court held that, under the principles of the common law which was in force in Alabama, the slaves would have been the property of the husband; yet, under "the Mississippi statute of 1839, commonly called the woman's law, they would remain the separate property of the wife": Citing *Hutchinson's Mississippi Code*, 497.

In *Augusta Ins. Co. v. Morton*, 3 La. Ann. 417, a case is stated of a suit brought on two promissory notes which were executed by the husband and wife jointly in the state of Maryland, where they resided and continued to reside, and the legal question was as to the capacity of the wife to make the contract which was secured by a mortgage on property in Louisiana, and, in discussing the married woman's capacity to contract, the court said: "The disability to contract exists only in a certain contingency, and that contingency is strictly personal. . . . This article does not even purport to affect the immovable property of married women. Its operation upon such property is only indirect. . . . It has no one characteristic of what is considered in jurisprudence as a real statute. These laws are real, in contradistinction to personal statutes, which regulate, directly, property, without reference to the condition or the capacity of its possessor."

In *Succession of Thomas*, 35 La. Ann. 19, a clear illustration is given of the law of situs as it appertains to personal and movable property and debts situated in the state of Mississippi, the decedent having died at Biloxi, Mississippi, possessed of no property other than some promissory notes and her wearing apparel. On this state of facts, the court said: "From all this it

appears that there is nothing in Louisiana that can give jurisdiction to this court. The only property the decedent died possessed of is personal or movable, and this species of property follows the domicile, and is determined by its laws. Its disposition or transmission by inheritance depends on the law of that domicile; and this is especially true of debts which follow the creditor's person." ¹⁴³⁷ But the court further held that if the proof had shown that the deceased owned personal property situated in Louisiana, a court of that state would have possessed jurisdiction over it, notwithstanding her domicile was in Mississippi.

In *Marcenaro v. Mordella*, 10 La. Ann. 772, the court made this important statement of the principles of the common law: "In a sister state it was held that this inchoate right of the husband to the choses in action of his wife, not reduced to possession, was entirely defeated by the subsequent passage of an act of the legislature vesting in the wife, in her own name, her real and personal property": See *Hayden v. Nutt*, 4 La. Ann. 65.

In *Bene v. Sparrow*, 11 La. Ann. 185, it was held that by the laws of Pennsylvania and Maryland, if the husband has not, during his life, reduced to possession the choses in action of his wife, they will pass to her representatives; and the court applied that rule to rights, credits, and choses in action which were assets of the estate of a decedent which were partly situated in Mississippi and partly in Louisiana.

In *Succession of Robinson*, 23 La. Ann. 174, it was held that the revenues of property situated in Mississippi, which belonged to the husband, who resided in Louisiana, did not belong to or form part of the legal community in Louisiana.

It appears from the opinion that the spouses were married and resided in Mississippi, and owned a plantation there, and removed therefrom to Louisiana in 1851, and the wife died in 1863 at the family domicile therein; and the legal question involved was, whether or not the revenues of the real estate in Mississippi belonged to the Louisiana community; and the court held that they did not.

In *Peale v. White*, 7 La. Ann. 449, the court made this very clear statement with regard to the situs of money, stocks, and bills receivable, viz.: "It does not appear where the deceased resided. His property was entirely personal, consisting of government stocks, bills receivable, and a small sum of money. If the deceased was a resident of England, transiently passing through our country, the disposition of his personal property,

according to the laws of England, would be valid. And the official knowledge we have of these laws enables us to say that the bequests in controversy are in conformity with the laws of England."

¹⁴³⁸ With regard to the legal situs of personal property and debts and contracts, the general doctrine is well stated in Succession of Packwood, 9 Rob. (La.) 438, 41 Am. Dec. 341, as follows, viz.: "We regard it, also, as a well-settled principle of law that personal property has no other situs than the domicile of the owner, and that its disposition and transmission, by contract or inheritance, depends upon the law of the owner's domicile." This doctrine is especially true of debts, which, according to all the authorities, follow the person of the owner or creditor.

The foregoing adjudications of this court merely state the general principles of the common law of England as it exists in Mississippi, except in so far as it has been modified by statute, and harmonize same with the community law of Louisiana; and to make this statement clear we have collated the following excerpts from text-books of well-known authors, and, also, from adjudications of the supreme court.

Judge Story puts the proposition thus: "The general principle certainly is, as we have already seen, that between persons *sui juris* marriage is to be decided by the law of the place where it is celebrated. If valid there, it is valid everywhere. It has a legal ubiquity of obligation": Story on Conflict of Laws, sec. 113.

In Wilkins v. Elliott, 9 Wall. 740, the court thus very tersely stated the accepted canon of construction with reference to the situs of personal property: "It has long been settled, and is a principle of universal jurisprudence in all civilized nations, that the personal estate of the deceased is to be regarded, for the purposes of succession and distribution, wherever situated, as having no other locality than that of his domicile; and if he dies intestate, the succession is governed by the law of the place where he was domiciled at the time of his decease, and not by the conflicting laws of the various places where the property happened to be at the time situated."

But the principle is nowhere stated with greater force and perspicuity than by Chancellor Kent: "But it has become a settled principle of international jurisprudence, and one founded on a comprehensive and enlightened sense of public policy and convenience, that the disposition, succession to, and distribution of

personal property, wherever situated, is governed by the law ¹⁴³⁹ of the country of the owner's or intestate's domicile at the time of his death, and not by the conflicting laws of the various places where the goods happened to be situated. The principle applies equally to cases of voluntary transfer, of intestacy and of testaments. On the other hand, it is equally settled in the law of all civilized countries, the real property, as to tenure, mode of enjoyment, transfer and descent, is to be regulated by the *lex loci rei sitae*. Personal property is subject to that law which governs the person of the owner. Debts and personal contracts have no locality—*debita sequuntur personam debitoris*": 2 Kent's Commentaries, 429.

This principle was recognized and applied by the English court in the case of *Sill v. Worswick*, 1 H. Black. 690, and Lord Ellenborough, speaking for the court, said: "Personal property has no visible locality, but it is subject to that law which governs the person of the owner."

In *Murray v. Charleston*, 96 U. S. 432, it was held that debts are not property; and a nonresident creditor of a city cannot be said to be, in virtue of a debt which it owes him, "a holder of property within its limits."

From the foregoing decisions, we have the following propositions established: 1. That the community law of this state is regarded as a real statute, as it is in France and Spain; 2. Being a real statute, it deals with and regulates property situated in this state, and does not deal with personal rights or condition of the spouses; 3. That the state and condition of husband and wife are fixed by the marriage in everything except property, independent of this law; 4. That if a personal statute of the domicile in this state is in opposition to a real statute of situation, the real statute will prevail, or, in other words, it regulates property situated in the state independently of the personal rights of the owner arising out of marriage; 5. That as the community law results only from positive legislation, it can have effect only under circumstances that are especially provided for; 6. That disability to contract, to acquire, or to recover only exists in a certain contingency, and that contingency is strictly personal, and its operation upon property is entirely incidental; 7. That, under the law governing the jurisprudence in the state of Mississippi, personal property that is situated at the domicile of a citizen of that state is governed thereby, ¹⁴⁴⁰ and same does not become subject to the law of Louisiana; 8. That the foregoing rule is especially applicable

to "debts which follow the creditor's person"; 9. That the rule thus announced does not apply to personal or movable property situated in this state, but it does apply to debts and other incorporeal rights, which attach to the person of the creditor, and pass with him into any jurisdiction where he may go; 10. That under the principles of the common law of England, which prevails in Mississippi, except in so far as it has been modified by statute, choses in action of the wife, not reduced to possession by the husband, are under her exclusive control, but that restriction has been entirely removed by statutes which give her absolute and exclusive control of same.

Having made an extensive examination of the jurisprudence of this court and that of the courts of other states and countries, it seems evident that the claim for damages which the plaintiff has brought is not property real or personal in the ordinary acceptation of the term, but an intangible thing without visible locality, which is exclusively under her control as the party injured, and passes with her wherever she may go. That it is transitory and has no other situs than that she has given it by the institution of this suit, and which she might have brought with equal propriety in a court of either Mississippi, where she lives, or in Connecticut, where the defendant abides.

In this connection, we cannot do better than quote the following language that was employed by Mr. Justice Miller, in *Dennick v. Railroad Co.*, 103 U. S. 17, in dealing with defendant's liability in a civil action for damages resulting from a wrongful act whereby death resulted, viz.: "It can be scarcely contended that the act belongs to the class of criminal laws which can only be enforced by the courts of the state where the offense was committed, for it is, though a statutory remedy, a civil action to recover damages for a civil injury. It is, indeed, a right dependent solely on the statute of the state; but when the act is done for which the law says the person shall be liable, and the action by personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process, etc."

That decision teaches that an action for damages resulting from a wrongful act is a civil action in the enforcement of a statutory remedy ¹⁴⁴¹ which is supplied by the state where same was committed to the person injured; and that such an

action is a personal one and of that character which the law recognizes as transitory and not local, and may be brought in any court where the trespasser may be found.

The authorities demonstrate the utter impossibility of such right of action being "property acquired" in this state, in the sense of Revised Civil Code, 2400, and, therefore, an asset of a legal community, existing between the plaintiff and her husband *pro hac vice*.

If it is to be treated and considered as personal property, its legal situs is at the matrimonial domicile of the plaintiff in the state of Mississippi, and for that reason cannot be considered as a community asset with its domicile in the state of Louisiana; and being a debt or chose in action, it belongs and attaches to the person of the plaintiff, follows her wherever she goes, and possesses no other situs than such as she is pleased to give it.

Entertaining this view with regard to the demand of the plaintiff, and finding that, in respect to the enforcement of same, she is a person *sui juris* under the law of Mississippi, in which state her matrimonial domicile exists, our opinion is that she must be recognized as possessing legal capacity to institute and prosecute this suit in her own name; and it consequently results that the judgment appealed from, in this respect, is erroneous.

3. The other exceptions become practically unimportant in view of the conclusions we have already announced in the preceding paragraphs, and they may be treated and considered collectively.

(a) Instead of the plaintiff's petition being vague, indefinite, and general, it is full, concise, clear and most specific in details; very much more so than would seem to have been necessary for the presentation of a cause of action like this—an action in damages for personal injury.

In so far as the averments of the petition being inadequate in respect to the statement of the facts as to the whereabouts of the plaintiff's husband is concerned, it seems to us of but little importance, as she is *sui juris*, and he, altogether, without interest in the matter in litigation. His whereabouts at the time when the suit was filed is of no more concern to the defendant than it was when the wrongful act was done; and ¹⁴⁴² a more specific statement of the facts in that particular would serve the defendant to no better purpose in the preparation of its defense than it would afford the court in deciding the cause.

(b) The objection that the court inadvertently granted to the plaintiff, as a married woman, an authorization to prosecute this suit and stand in judgment, because of insufficient averment of her husband's absence and his refusal or declination to grant her permission to institute the same, seems inconsequential, inasmuch as she is *sui juris*, and therefore competent to sue without his co-operation or assistance in reference to matters that are personal to herself.

But if that were not so, the mere appearance of the wife in court without the authorization of her husband raises the presumption that her husband has refused his permission, and the judge may act on that presumption, and authorize her suit. This is elementary: *Jemison v. Barrow*, 24 La. Ann. 171.

(c) The objection that the defendant is entitled to know how the plaintiff divides her damages, and to be informed what portion of same is demanded as actual damages and what portion as punitive damages, and that, as the plaintiff's petition has not furnished the information, her suit should be dismissed, is without merit, this question having been decided just the other way: *Bickham v. Hutchinson*, 50 La. Ann. 765, and the authorities therein cited.

(d) With regard to the plaintiff's right to prosecute this suit on behalf of her minor daughter, the judge *a quo* expressed the following view, viz.: "As to the exception that the plaintiff is without right to prosecute this suit on behalf of her minor daughter, Florence, the court is of the opinion that the exception is well taken. I have carefully examined all the French authorities on the subject of absence and disappearance, for the code of Napoleon contains provisions very similar to our code, and contains an article which is exactly similar to the article in the code relied upon by the plaintiff as her authority to bring this suit on behalf of her minor child. These authorities are to the effect that a disappearance within the meaning of this article is not a mere temporary doubt as to the present whereabouts of an individual that disappears, within the meaning of the code of Napoleon and the Louisiana code, but such a disappearance as to leave the very existence of the person, ¹⁴⁴³ so said to have disappeared, in doubt. This theory is absolutely inconsistent with the allegations of the petition in the case at bar, for the petitioner at two places in her petition set forth that the exclusive matrimonial domicile is in the state of Mississippi; that her husband resides and is domiciled in the state of Mississippi, and that her husband had disappeared from the

matrimonial domicile, and has since absented himself therefrom, and that she is not aware of the precise locality in Mississippi in which he may be found, thus reiterating in two places that the husband is in the state of Mississippi, and simply denying that she is aware at the present time of his precise locality. This is not a disappearance within the meaning of the article, and under an allegation like this, it is not competent for the wife to bring suit on behalf of her minor child."

In the absence of any averment as to what are the provisions of the law of Mississippi with regard to the authority of the mother to sue for and on behalf of her minor daughter, the law of that state will be presumed to be the same as our own: *Allen v. Allen*, 6 Rob. (La.) 104, 39 Am. Dec. 553.

The right of action on the part of the minor is not denied, but the exception is that her mother has no authority to appear in court in her behalf. We have found that the mother is *sui juris*, and can sue in her own behalf, and the question is whether she can represent her minor daughter, who was the subject of a common wrong which defendant inflicted on both of them.

Plaintiff relies upon Revised Civil Code, article 81, as furnishing adequate authority for her suit in behalf of her minor daughter, the provisions of which are as follows, viz.: "If a father has *disappeared*, leaving minor children born during the marriage, the mother shall take care of them, and *shall exercise all the rights of her husband with respect to their education and the administration of their estate.*" (Our italics.)

The only question of doubt is with regard to the real meaning of the word "disappeared." This article is found in the title of the code which treats of "absentees," and in the chapter entitled, "Of the care of minor children when the father has disappeared."

Upon making an examination of the provisions of the code under the title of "Father of the child," we find what are rights which the father and mother may exercise, and amongst them the following, viz.: 1444 "Fathers and mothers owe protection to their children, and of course they may, as long as their children are under their authority, appear for them in court in every kind of civil suit, etc.": Rev. Civ. Code, 235. That authority is conferred upon the father and mother jointly when they are both present; and it stands to reason that the mother should be authorized to act separately and alone in case the "father has disappeared."

The law provides that "when a person, possessed of either movable or immovable property within this state, shall be absent, or shall reside out of the state," the judge of the place may appoint a curator: Rev. Civ. Code, 47.

It must be observed that it is quite sufficient that the person "shall be absent or shall reside out of the state"—either one or the other. No particular period of time is fixed for said absence or residence to have continued—that being left to the sound legal discretion of the judge.

The same is true of the term "disappeared"; neither the length of disappearance nor the locality to which he has gone is specified.

The allegations of the petition with regard to the disappearance of the child's father are about as definite as they could be expected to have been in any case of disappearance. A disappearance implies doubt and want of knowledge as to his locality or the length of time he would remain away. Under the circumstances, we are of opinion that the mother was authorized to appear in court in behalf of her minor child and claim the damages due her by the defendant, and stand in judgment therefor. We think the exceptions not well grounded, and that they should have been overruled.

It is therefore ordered and decreed that the judgment sustaining the defendant's exceptions and dismissing plaintiff's suit be annulled and reversed; and it is further ordered and decreed that the suit be reinstated and remanded to the court a quo for a trial upon the merits, and that the cost of appeal be taxed against the defendant and appellee.

Breaux, J., concurred in the decree.

CONFLICT OF LAWS—ACTIONS EX DELICTO.—An action may be maintained in Mississippi by a citizen of Illinois against a corporation of the same state for a tort committed by it in Illinois: Monographic note to *Eingartner v. Illinois Steel Co.*, 59 Am. St. Rep. 877, on the prosecution of transitory actions in foreign jurisdictions. See further on this subject, *Turner v. St. Clair Tunnel Co.*, 111 Mich 578, 66 Am. St. Rep. 397; *Eingartner v. Illinois Steel Co.*, 94 Wis. 70, 59 Am. St. Rep. 859; monographic note to *Morris v. Missouri Pac. Ry. Co.*, 22 Am. St. Rep. 22-27.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

STATE v. TIMMONS.

[90 Maryland, 10.]

CONSTABLE'S BOND—LIABILITY OF SURETIES—TRESPASS.—There can be no recovery against the sureties on the official bond of a constable for the latter's illegal acts done under a void distress warrant, for he is a mere trespasser.

OFFICIAL BONDS—ACTIONS ON—HOW TO BE BROUGHT.—A suit, for any official delinquency, on a bond given to the state, must be in its name, for the use of the party injured, but the remedy against an officer who acts as a mere trespasser is against him individually as a tortfeasor.

CONSTABLES—ACTS DONE UNDER VOID WARRANT OF DISTRESS—LIABILITY FOR.—A distress warrant for rent, issued without the affidavit required by statute, is void, and a constable who seizes and sells property under it is liable as a trespasser, but his sureties are not answerable for any acts done under it.

Graham & Fitch, for the appellant.

Thomas F. J. Rider and George W. Bell, for the appellee.

¹⁰ **BOYD, J.** This is an action on a constable's bond, and the declaration alleges that a distress warrant was directed to the constable against the plaintiff, William German, but in the service and execution of it he "did illegally and wrongfully seize, sell, and dispose of certain goods and chattels of the plaintiff," etc. The suit seems to have been brought on the theory that the constable and his sureties were liable ¹¹ because the former made a sale of German's property, which was illegal by reason of the fact that he had not made a levy or inventory of the goods or given notice to the tenant, as re-

quired by the statute of 2 William and Mary, chapter 5, in force in this state, but, under our view of the case, it will be unnecessary to discuss those omissions. In the course of the trial the defendants were required to produce the distress warrant under which the constable proceeded, and the plaintiff offered it in evidence. To the account annexed to it there is no affidavit. Section 8 of article 53 of the code provides that "every landlord or his agent, who may be authorized to distrain for rent due him, shall, previously to making such distress, make oath before some justice of the peace . . . that his tenant is justly and bona fide indebted to him in the sum of ——— dollars and ——— cents," etc. Section 9 provides that: "To every warrant authorizing any bailiff to levy a distress for rent there shall be prefixed or annexed the account of such landlord, . . . together with an affidavit thereon, in substance as required by the preceding section," and section 16 that: "Every distress for rent which shall be made contrary to the provisions of this article and all sales made under and by virtue of such distress, shall be absolutely illegal and void."

That this warrant was wholly lacking in one of the most important requirements of the statute (the affidavit), and therefore null and void, cannot be doubted. As was said in *Cross v. Tome*, 14 Md. 247, the object of these provisions is "to protect the tenant from onerous and oppressive proceedings by the landlord, and to prevent the levying of excessive distress by requiring the sum claimed, as actually due and in arrears, to be clearly stated and verified by oath." The warrant being null and void, it is manifest that the landlord would not have had any remedy against the constable's bond if he had failed or refused to act under it, and the question to be determined is whether the tenant can hold the sureties responsible for any acts done under it.

¹² There can be no doubt that a constable acting under a void warrant is a trespasser, and is not protected by reason of such a warrant being issued to him if he enforces it, for although the law does not hold an officer responsible as a trespasser for acting under a warrant that is merely defective or irregular, yet when it is void on its face, it is as if no warrant had been issued to him. That being so, how can there be any recovery against the sureties of this constable for the alleged illegal acts done by him under this so-called warrant? The case of *State v. Brown*, 54 Md. 318, is conclusive of the question. It is there said: "The condition of the bond is 'that he

shall well and faithfully execute the office of constable.' By this contract the sureties guarantee the public against official delinquency on the part of the officer. For any breach of official duty his bond is responsible; this is the extent of liability assumed by the sureties. If he commits a wrong, not in the discharge of his official duty, he is personally liable, but his sureties cannot be held responsible therefor; it is not within the terms of their contract." It was held in that case that an action could not be maintained against a constable and his sureties on his official bond for a trespass committed by him in taking the goods of a stranger on an execution issued against the property of another person, and it would seem to necessarily follow that they would not be responsible for acts done by him under a void warrant—it being equivalent to his acting without any warrant. In the doing of such act he is not to be regarded as an officer. The distinction is made between wrongful acts by an officer done *virtute officii* and such as are done *colore officii*. In *Alcock v. Andrews*, 2 Esp. 542, Lord Kenyon said the former are such as "when a man doing an act within the limits of his official authority exercises that authority improperly or abuses the discretion placed in him. The latter are where the act committed is of such a nature that the office gives him no authority to do it; in the doing of that act he is not to be considered as an officer." The case of *State¹³ v. Fowler*, 88 Md. 601, 71 Am. St. Rep. 542, is an illustration of the former, and that of *State v. Brown*, 54 Md. 318, of the latter, and this case clearly comes within the latter class.

Article 20 of section 10 of the code was referred to by the appellant as adding strength to his contention. That section requires the constable to serve and execute a warrant of distress within the limits of the district for which he is appointed, and provides that his bond shall be responsible for the due performance of his duties. It also authorizes him to execute such warrants in any part of his county, although it does not require him to execute them beyond his district, and concludes "if he executes or undertakes to execute the same his bond shall be liable." But the liability of the bond is dependent upon his proceeding under "a warrant of distress," and the statute does not mean that the bond is responsible, although there is no such warrant, or, what is the same thing, when it is absolutely void.

The court below instructed the jury "that under the pleadings in this cause there is no legally sufficient evidence to en-

title the plaintiff to recover." The declaration, as given in the record, shows that William German sues the defendants, and it does not show that the state of Maryland sues for the use of William German. As the bond was given to the state of Maryland, the suit must be in its name for the use of the party injured, and William German could not recover on a bond given to the state in a suit brought in his name, but as the docket entries are "state of Maryland, use of William German," it may be that this is simply a mistake in the record, and we, therefore, do not base our decision on that technical ground, but decide the case on its merits, and hold that the sureties of a constable thus acting under a void distress warrant are not responsible, as their contract was to protect the public against his official delinquency and not against acts which he was not authorized to do as constable—that is to say, to proceed by way of distress, without a valid warrant. The remedy under such circumstances ¹⁴ is against him individually as a tortfeasor, or, when the facts justified it, against the landlord, or both. The judgment will be affirmed.

Judgment affirmed, the costs to be paid by the appellant.

Whether and When the Sureties on an Official Bond may Escape Liability on the Ground that Their Principal was a Trespasser.*

The liability of sureties on an official bond for the acts of their principal seems to turn upon the distinction between acts *virtute officii* and those done *colore officii*. Thus, the sureties of a sheriff are liable for his wrongful acts done *virtute officii*, but not, according to numerous cases, for those done *colore officii*: *State v. Fowler*, 88 Md. 601, 71 Am. St. Rep. 452; *People v. Schuyler*, 4 N. Y. 173, 187. Acts done *virtute officii* are such that, if properly done, they create no liability, but which, if neglected, or improperly done, or which involve an abuse of discretion, render the officer and his sureties liable: *State v. Fowler*, 88 Md. 601, 71 Am. St. Rep. 452; *State v. Conover*, 28 N. J. L. 224, 78 Am. Dec. 54; *People v. Schuyler*, 4 N. Y. 173, 187; *Morris v. Van Voast*, 19 Wend. 283; *Seeley v. Birdsall*, 15 Johns. 267. Acts *colore officii*, for which the sureties of an officer are not answerable, are such as neither the office nor the writ gives the officer authority to do: *State v. Fowler*, 88 Md. 601, 71 Am. St. Rep. 452; *People v. Schuyler*, 4 N. Y. 173, 187; *Seeley v. Birdsall*, 15 Johns. 267. One acting under color of au-

*** REFERENCE TO MONOGRAPHIC NOTES.**

Official bonds of sheriffs and constables, what constitute breaches of: 46 Am. Dec. 509-517.

When act of incumbent of office is to be regarded as an official act, and when not: 6 Am. St. Rep. 130-133.

Sheriffs—liability of sureties for personal injury inflicted by officer: 71 Am. St. Rep. 519-522.

thority cannot justify the act. He is not acting officially. Official acts are those done by virtue of office; but unofficial acts are such as are committed under color of office, and which cannot be lawfully done or justified by the official character of the officer, or by any process in his hands: *State v. Conover*, 28 N. J. L. 224, 78 Am. Dec. 54. The words, "color of office," necessarily imply an illegal claim of right or authority, on the part of an officer, to do the act in question by virtue of his office, which claim is a mere color or pretense on his part: *Burrall v. Acker*, 23 Wend. 606, 35 Am. Dec. 582.

As intimated above, the cases are conflicting upon the question as to the liability of the sureties of an officer, upon his official bond, for his unauthorized acts, official misconduct, or trespasses. Some cases hold that an officer is liable on his official bond for acts done *colore officii*, as well as for his default in acts done *virtute officii*: *State v. Druly*, 8 Ind. 431; *Lowell v. Parker*, 10 Met. 309, 43 Am. Dec. 436; *Jewell v. Mills*, 3 Bush, 62; *Jefferson v. Hartley*, 81 Ga. 716. Thus, the sureties on the official bond of a constable have been held answerable for his illegal acts while engaged in making an arrest: *Cash v. People*, 32 Ill. App. 250; and for an arrest under color of authority, but prompted by private malice: *Clancy v. Kenworthy*, 74 Iowa, 740, 7 Am. St. Rep. 508. A sheriff and his sureties have been held liable on the official bond of such officer for torts committed by him under color of his official right: *Charles v. Haskins*, 11 Iowa, 329, 77 Am. Dec. 148; and a constable and his surety are answerable, on their official bond, for the tortious acts of the constable done under color of his office: *Jewell v. Mills*, 3 Bush, 62. A constable acts under color of his office, and his sureties are answerable on his official bond where he attaches goods under a writ in which the damages exceed seventy dollars, and makes return that he has attached the goods by virtue of the writ: *Lowell v. Parker*, 10 Met. 309, 43 Am. Dec. 436. So it has been held that a misdemeanor, who has been shot by an officer, or his deputy, in attempting to arrest him under a warrant or in attempting to prevent his escape after arrest, may maintain an action for damages on the officer's official bond: *Brown v. Weaver*, 76 Miss. 7, 71 Am. St. Rep. 512; and that a constable and his sureties are answerable for injury to a third party's horse, which was being ridden by a prisoner, charged with a misdemeanor, and in the custody of the constable, but which was shot by the officer in firing upon the prisoner, when he attempted to escape: *Stephenson v. Sinclair*, 14 Tex. Civ. App. 133. A sheriff and his sureties are also answerable in damages on his official bond for a breach of his duty in allowing a mob to take a prisoner from jail and hang him: *State v. Gobin*, 94 Fed. Rep. 48. Contra, *State v. Wade*, 87 Md. 529. Under the code of Alabama, a principal and his sureties on every official bond are answerable for the tortious acts of the principal committed under color of his office: *Conch v. Davidson*, 109 Ala. 313, 320; *Albright v. Mills*, 86 Ala. 324.

It thus appears that there is a strong tendency to hold sureties on an official bond answerable for all wrongful acts of their principal, however done. But we do not understand that the official bond of a sheriff or constable is an engagement for general good behavior on his part. The sureties do not bind themselves to protect the public against every act of their principal, nor do they become his sureties to keep the peace: See monographic note to *Commonwealth v. Cole*, 46 Am. Dec. 509, on what constitute breaches of official bonds of sheriffs and constables. There must be some limit to their liability, some line of demarcation designating those acts of the principal to which their liability extends and beyond which it does not extend; but as this line has not been very clearly drawn by the courts, the only way to establish it is to consider the various classes of cases in which sureties have been held liable or not liable for the misconduct of their principal. There is abundance of good authority in support of the proposition that the sureties on an official bond are not answerable for unlawful or unauthorized acts, or, in legal phrase, acts done *colore officii*, by their principal: *State v. Fowler*, 88 Md. 601, 71 Am. St. Rep. 452; *Gerber v. Ackley*, 37 Wis. 43, 19 Am. Rep. 751; *Huffman v. Koppelkom*, 8 Neb. 344; *State v. Conover*, 28 N. J. L. 224, 78 Am. Dec. 54; *Ex parte Reed*, 4 Hill, 572; *Taylor v. Parker*, 43 Wis. 78; *Bourne v. Shapleigh*, 9 Mo. App. 63; *Ottenstein v. Alpaugh*, 9 Neb. 237; *State v. Mann*, 21 Wis. 684; *State v. Brown*, 11 Ired. 141. The sureties on the official bond of a sheriff or constable are not answerable for acts done outside the duties of his office. They are not answerable for extra-official acts or undertakings of their principal: *Ex parte Reed*, 4 Hill, 572; *Robinson v. State*, 47 Miss. 423; *Eaton v. Kelly*, 72 N. C. 110; *Hill v. Kemble*, 9 Cal. 71; *Bogart v. Green*, 8 Mo. 115; *Governor v. Perrine*, 23 Ala. 807; *Governor v. Hancock*, 2 Ala. 728; *Turner v. Collier*, 4 Helsk. 89; *People v. Foster*, 133 Ill. 496; and the same principle is laid down in *Wilkes-Barre v. Rockafellow*, 171 Pa. St. 177, 50 Am. St. Rep. 795. Nothing is a breach of a sheriff's bond to perform his official duties except a failure by him to perform one or more of them: *Collier v. Stoddard*, 19 Ga. 274. If an officer departs from his line of duty pointed out by law, at the promptings of the plaintiff, his securities are discharged, and he becomes the plaintiff's agent: *Rollins v. State*, 13 Mo. 437, 50 Am. Dec. 151. The act of a constable, to render him and his sureties liable on his bond, must be done by him as constable, under claim of a right to do it by virtue of his office: *Commonwealth v. Cole*, 7 B. Mon. 250, 46 Am. Dec. 506.

The sureties on the official bond of a sheriff or constable are not answerable for the act of the officer in making an arrest without actual or apparent legal authority, for he is, under such circumstances, a mere trespasser: *Allison v. People*, 6 Colo. App. 80. If an officer having process in his hands does an act which he has no right to do, he is not acting by virtue of his office, and therefore

the sureties on his official bond may escape liability for such act: *Marquis v. Willard*, 12 Wash. 528, 50 Am. St. Rep. 906. The sureties of a sheriff or constable may escape liability for his illegal act in arresting a person under process void upon its face: *McLendon v. State*, 92 Tenn. 520; for the act of an officer under void process is a trespass: *Allison v. People*, 6 Colo. App. 80. The sureties of a chief of police may escape liability for his act in making a wrongful and malicious arrest, on the ground that he was a trespasser, though he had process: *State v. McDonough*, 9 Mo. App. 63. So, the sureties of a chief of police are not answerable for his receiving and detaining persons in prison, when he acts without warrant or other process and without authority of law. His act, while it may have been done under color of his office, was not by virtue thereof, and is not an official act: *Marquis v. Willard*, 12 Wash. 528, 50 Am. St. Rep. 906.

A sheriff who collects taxes without authority is a mere trespasser, and his sureties are not liable: *Greenwell v. Commonwealth*, 78 Ky. 320. Compare *White v. Saginaw*, 43 Mich. 567. On the other hand, it has been held that while a sheriff, who commits a wrongful act in levying upon property to enforce the payment of taxes illegally assessed upon property not subject to taxation, is a trespasser, yet his sureties are answerable for his act: *State v. Schacklett*, 37 Mo. 280.

The sureties of an officer upon his official bond may escape liability for his acts in seizing property which amount to a trespass: *State v. Brown*, 11 Ired. 141. Thus, the sureties of a sheriff are not answerable for his wrongful seizure of property, when not made by him in his official character under process: *State v. Mann*, 21 Wis. 684, 687; and the sureties on the official bond of a United States marshal may escape liability for the acts of his deputy, who seizes property without any writ or process, and without the knowledge, instructions, or assent of his principal, and not in the discharge of any duty imposed upon him by law as such officer: *Dysart v. Lurty*, 3 Okla. 601. In this case, the court said: "The weight of authority seems to support the doctrine that sureties on an official bond are only answerable for the acts of their principal while engaged in the performance of some duty imposed upon him by law, or for an omission to perform some such duty": *Dysart v. Lurty*, 3 Okla. 601, 606, citing numerous cases. A surety of a constable is not answerable, on his official bond, for the officer's acts of violence, which are personal wrongs, in levying a fieri facias or distress warrant: *Jewell v. Mills*, 3 Bush, 62; nor can the sureties on the official bond of a United States marshal be held to answer in damages for his alleged cruel and inhuman conduct toward a prisoner, where no such conduct is proved, and there is no express malice, and nothing to connect the sureties with the alleged trespass: *Clinton v. Nelson*, 2 Utah, 284. An officer is not justified in breaking open an outer door or window in order to execute civil

process, as a writ of replevin or to levy a fieri facias or distress warrant: *State v. Beckner*, 132 Ind. 371, 32 Am. St. Rep. 257; *Jewell v. Mills*, 3 Bush, 62; and if he does so, he commits a trespass: *State v. Beckner*, 132 Ind. 371, 32 Am. St. Rep. 257; *Jewell v. Mills*, 3 Bush, 62; but in *State v. Beckner*, 132 Ind. 371, 32 Am. St. Rep. 257, it is held that, when a constable commits a trespass by breaking open an outer door in attempting to execute civil process in replevin, he and his bondsmen are liable in damages for all injuries received by the householder in resisting such unlawful levy; while in *Jewell v. Powell*, 3 Bush, 62, it is held that the sureties of a constable are not liable for his trespass in forcing open an outer door or window, which is closed and fastened, for the purpose of levying a fieri facias or distress warrant, or for his acts in cursing and abusing the family in the house, assaulting a boarder therein, by presenting a pistol at her, threatening to shoot her, and demanding of the plaintiff a watch belonging to her.

The sureties upon a sheriff's bond may escape liability for a wrong committed by him in aiding and abetting a mob in lynching a prisoner in his charge: *State v. Wade*, 87 Md. 529; contra, *State v. Gobin*, 94 Fed. Rep. 48; and the sureties upon a United States marshal's bond are not answerable for the acts of his deputy and a posse in shooting an innocent person by mistake for a horse thief, while searching, without a writ, and without the authority of the marshal, for such horse thief: *Chandler v. Rutherford* (Indian Ter.), 51 S. W. Rep. 981. If a sheriff of one state, holding a warrant for the arrest of a resident of another state, proceeds to that state, and there assaults, imprisons, or otherwise wrongs him, the sureties of the officer would not be answerable for such acts, but if he brings the prisoner to the former state, without any warrant of extradition, his sureties are liable for his acts toward the prisoner in that state: *Kendall v. Aleshire*, 28 Neb. 707, 26 Am. St. Rep. 367.

A few cases hold that where a sheriff or constable seizes and sells the property of one man under an execution or attachment against the property of another, his act is not an official act, but a mere personal trespass, for which his sureties cannot be held answerable: *Taylor v. Parker*, 43 Wis. 78; *State v. Conover*, 28 N. J. L. 224, 78 Am. Dec. 54; *Berry v. Schaad*, 59 N. Y. Supp. 551, 28 Misc. Rep. 389. But the great preponderance of authority is in favor of the doctrine that the act of a sheriff or constable in seizing and selling the property of one person under an execution or attachment against that of another is an official act for which he and his sureties are liable upon his official bond: See monographic note to *Palmer v. St. Albans*, 6 Am. St. Rep. 131, showing what are official acts, and citing numerous cases on the point stated; also, *Lammon v. Fensler*, 111 U. S. 17, where the conflicting authorities are grouped. In addition to the cases cited to this point in the note to *Palmer v. St. Albans*, 6 Am. St. Rep. 131, may be added *Turner v. Sisson*, 137 Mass. 191; *Albright v. Mills*, 86 Ala. 324; *People v.*

Mersereau, 74 Mich. 687; Sangster v. Commonwealth, 17 Gratt. 124; Brunott v. McKee, 6 Watts & S. 513. In a comparatively late New York case, it has been held that a seizure and sale by a constable of the property of one person on an execution against another does not constitute a breach of the condition of the official bond of the constable that he will pay to the person entitled thereto all such sums of money as the constable may become liable to pay on account of an execution which shall be delivered to him for collection: People v. Lucas, 93 N. Y. 585; distinguishing People v. Schuyler, 4 N. Y. 173, which latter case apparently overruled Ex parte Reed, 4 Hill, 573.

An action upon a sheriff's bond is properly brought in the name of the state: State v. Moore, 19 Mo. 369, 61 Am. Dec. 563; Meler v. Lester, 21 Mo. 112; unless the purpose is to redress a private wrong, in which case the suit should be brought in the name of the injured party: See McLendon v. State, 92 Tenn. 520, 530; Hollister v. Hubbard, 11 S. Dak. 461. That a sheriff represented an act to be official in its character, or that he has assumed to act where he had no authority virtute officii, can never estop the sureties from alleging the truth; because they are only bound by his representations and his conduct, when discharging a duty imposed by law: Governor v. Pearce, 31 Ala. 465.

WOOTTON v. WHITE.

[90 Maryland, 64.]

GROWING CROPS FORM A PART OF THE REAL ESTATE to which they are attached and follow the title thereto.

CROPS ON MORTGAGED PREMISES—SEVERANCE.—If a crop is growing upon mortgaged premises, the mortgagor cannot, by executing a bill of sale thereof, defeat the mortgagee's right to sell the crop on foreclosure, or the right of the purchaser at such a sale to claim the crop. A bill of sale does not work a severance of the growing crop.

CROPS ON MORTGAGED PREMISES—FORECLOSURE BEFORE SEVERANCE—OWNERSHIP.—If a crop is growing upon mortgaged premises, and the mortgagor gives a bill of sale thereof to a third person, but the premises are sold under foreclosure proceedings before the crop is actually severed from the land, such crop passes to the purchaser.

Thomas Anderson and W. Viers Bonic, Jr., for the appellant.

Talbott & Talbott, for the appellee.

⁶⁵ McSHERRY, C. J. The question presented by this appeal is a simple one, though it has been decided in opposite

ways in other jurisdictions. It must now be definitely settled in Maryland. It arose in this way: In 1892 Thomas H. White and wife conveyed by way of mortgage to James C. Holland their equity of redemption in a tract of land lying in Montgomery county, and by the same mortgage the fee in another and adjoining tract to secure the payment to Holland of an indebtedness which they owed to him. Subsequently, the appellee, Huldah A. White, recovered a judgment against the mortgagor, White, for some sixteen hundred dollars, and this judgment was a lien on the mortgaged property, but was subordinate to the lien of the mortgage. In the fall of 1896, Thomas H. White, the mortgagor, seeded a crop of wheat on both parcels of the mortgaged lands. He purchased from the appellant, Dr. Wootton, the fertilizer used in planting that crop, and in February following, when the mortgage was overdue, he executed and delivered to the appellant a bill of sale of the growing crop in consideration of the sum due for the fertilizer. On May 31, 1897, the attorney named in the mortgage sold the mortgaged premises, with the growing crop of wheat thereon, under the power contained in the mortgage, at public sale, to the appellee, for a price below the aggregate of the liens which were prior to the appellee's judgment, and the appellee realized nothing on her judgment. The mortgage sale was ratified by the circuit court on June 29th, before the wheat was cut and severed from the land. After the mortgage sale the appellant claimed, under his bill of sale, the wheat crop; but the appellee, the purchaser of the mortgaged premises, garnered the crop. Thereafter, the appellant brought this suit in trover against the appellee to recover the value of the wheat and straw. Judgment was entered in favor of the appellee, and the appellant has appealed. The question is, Did the appellant acquire under the bill of sale a title to the growing crop—a title which was paramount to that of the mortgagee, and therefore superior to any right which the purchaser at the mortgage sale took by virtue of that purchase?

If the title which the bill of sale gave to the appellant was subordinate to the lien of the mortgage, then obviously the judgment denying the appellant's right to recover the value of the wheat from the purchaser of the mortgaged premises was correct, as there is no pretense that the crop was excepted or reserved from the mortgage sale. If, on the other hand, the bill of sale gave to the appellant a title superior to the lien of the mortgage, it must have been because either the lien of the

mortgage did not attach to any crops planted after the execution and delivery of the mortgage, or because the execution and delivery of the bill of sale operated at law and in equity as a severance of the actually growing crops, converted them into detached personal property, and thereby exempted or subtracted them from the lien which attached when they were planted and annexed to the freehold. There is no other alternative. The first has not been, and could not be, contended for, because, though for some purposes growing crops are treated as personal property, and therefore are not within the fourth section of the statute of frauds, they none the less partake of the nature of the realty, and under a conveyance pass with the soil to which they are united, unless expressly reserved: *Coombs v. Jordan*, 3 Bland, 303, 22 Am. Dec. 236; 8 Am. & Eng. Ency. of Law, 2d ed., 303; 304. The general rule of the common law is that growing crops form a part of the real estate to which they are attached and from which they draw nourishment, and, unless there has been a severance of them from the land, they follow the title thereto.

⁶⁷ There was no actual severance of this growing wheat until after the ratification and confirmation of the mortgage sale, and it comes to the question whether the execution and delivery of the bill of sale in February, 1897, operated as a constructive severance of the crop that did not mature until the summer of that year, and whether by force of that bill of sale the crop, which unquestionably, but for the bill of sale would have passed to the purchaser of the soil at the mortgage sale, was excluded from the lien of the mortgage and was vested in the appellant. We have just said that the growing crop would unquestionably have passed to the purchaser at the mortgage sale had there been no bill of sale. This is incontestably the law. "The purchaser is entitled to the crops growing at the time of the sale to him, in preference to the mortgagor or anyone claiming under him whose claim originated subsequently to the mortgage": 2 Jones on Mortgages, sec. 1658. The author cites the following cases: *Shepard v. Philbrick*, 2 Denio, 174; *Jones v. Thomas*, 8 Blackf. 428; *Lane v. King*, 8 Wend. 584, 24 Am. Dec. 105; *Batterman v. Albright*, 122 N. Y. 484, 19 Am. St. Rep. 510; *Crews v. Pendleton*, 1 Leigh, 297, 19 Am. Dec. 750; *Parker v. Storts*, 15 Ohio St. 351; *Anderson v. Strauss*, 98 Ill. 485; *Ranklin v. Kinsey*, 7 Bradw. 215; *Scriven v. Moote*, 36 Mich. 64; *Calvin v. Shimer* (N. J. Eq., Sept. 14, 1888), 15 Atl. Rep. 255; *Beckman v. Sikes*, 35 Kan. 120;

Perley v. Chase, 79 Me. 519; Montgomery v. Merrill, 65 Cal. 432; Kerr v. Hill, 27 W. Va. 576; Hayden v. Burkemper, 101 Mo. 644, 20 Am. St. Rep. 643; Downard v. Groff, 40 Iowa, 597; Sherman v. Willett, 42 N. Y. 146.

It is true that there are cases in some of the other states which hold that the execution of a bill of sale, under the circumstances set forth in this record, works a severance of growing crops; but they are founded either upon some statutory provision, or upon a view of the relation between mortgagor and mortgagee, which does not obtain in Maryland. It must not be forgotten that we are not dealing now with the rights which the personal representative of a deceased owner of land has to the crops maturing after the ⁶⁸ death of the owner; nor with the right of a creditor to seize and sell growing crops; nor with the power of the owner of such crops to sell them by parol when there is no mortgage binding them. These are all aside of the question before us, and that question, to repeat it by way of emphasis, is, Can a mortgagor, who has planted crops that have become subject to the lien of a prior mortgage on the land, constructively sever that crop before it matures or ripens by merely executing and delivering a bill of sale of the uncut crop to a third party, so as to defeat the mortgagee's or the purchaser's right to claim the crop after he has purchased the land at a foreclosure sale made before the actual physical severance of the crop?

The doctrine is definitely settled in Maryland that the mortgagor while in possession and before foreclosure is regarded as the real owner of the property except as against the mortgagee. Though in dealings with third parties the mortgagor may be treated as the owner of the mortgaged premises, he is not so considered when the rights of the mortgagee are concerned. As between the mortgagor and mortgagee "by the legal, formal mortgage the property is conveyed or assigned by the mortgagor to the mortgagee, in form like that of an absolute conveyance, but subject to a proviso or condition and upon nonperformance of this condition, the mortgagee's conditional estate becomes absolute at law, and he may take possession thereof, but it remains redeemable in equity during a certain period": Duval v. Becker, 81 Md. 546; Bank of Commerce v. Lanahan, 45 Md. 407. It is obvious, then, from this relation that it is no more within the power of the mortgagor to impair the value of the mortgagee's security by cutting out from the lien of the mortgage and transferring to a third party,

discharged of that lien, a growing crop, which if unsevered will pass with the land at a foreclosure sale, than it is lawful for him to strip the mortgaged property of its appurtenant easements, as was unsuccessfully attempted in *Duval v. Becker*, 81 Md. 546. So long ⁶⁹ as the crop remains physically unsevered it partakes of the nature of the realty as between the mortgagor and mortgagee. It forms part of the latter's security for the payment of the debt, and all persons dealing with the mortgagor in respect to it whilst it remains actually attached to the freehold deal subject to all the rights of the mortgagee unimpaired and unaffected: *Martin v. Martin*, 7 Md. 377, 61 Am. Dec. 364. This must in the very nature of things be so. If the mortgagor may by the execution of a bill of sale constructively sever a growing crop planted after the date of a mortgage then in default, and by that act can prevent the purchaser from taking the crop when he buys at foreclosure sale the mortgaged property with the crop still growing thereon, then the mortgagor has it in his power to lessen the security held by the mortgagee, and subsequent judgment creditors of the mortgagor could, by seizing the crop and selling it under execution, produce precisely the same result. But this latter cannot be done if there has been no actual severance before a foreclosure sale: *Batterman v. Albright*, 122 N. Y. 484, 19 Am. St. Rep. 510; 11 L. R. Ann. 800, and cases in note.

So comprehensive is the rule as to growing crops passing to the purchaser of the land, that even the crops planted by a tenant of the mortgagor after the date of the mortgage pass to the purchaser of the realty upon a foreclosure of the mortgage whilst the crops are still standing: 8 Am. & Eng. Ency. of Law, 2d ed., 307, and cases in note.

It will be observed that we are dealing only with the question whether a mortgagor may by a bill of sale constructively sever a growing crop so as to prevent it from passing to a purchaser under a foreclosure sale when the sale of the land is made before the crop is actually cut therefrom. That he may effectually part with the title to a growing crop so as to preclude a subsequent mortgage from attaching to it may be conceded without affecting the decision of this case. We only mean, however, to hold that, owing to the relation existing between mortgagor and mortgagee in Maryland, the former cannot, before an actual severance of ⁷⁰ a growing crop, defeat by the execution of a bill of sale the right of the mortgagee of the land to sell the crop on a foreclosure, or of the purchaser at

such a sale to claim the crop. There is no hardship in this. If the mortgagor goes on and makes preparations for a crop, he does it with a full knowledge that the land with the crop is subject to be sold, if the sale takes place before he severs it. Nor does he lose anything by this, for the crop on the land enhances the price. If by this increase the debt be overpaid, he gets the surplus; if not, still the full value of his labor goes (as he had agreed it should go) to the payment of the debt secured by the mortgage: *Crews v. Pendleton*, 1 Leigh, 297, 19 Am. Dec. 750.

In 1 Jones on Mortgages, section 697, it is said: "But growing crops are personal property when severed from the land, and a sale or mortgage of them by the mortgagor amounts to a severance." Several New York cases are cited to support this proposition, and among them is *Sexton v. Breese*, 135 N. Y. 387. The case not only does not go the length of the text, but sustains the conclusion we have reached. The facts were these: The owner of a farm, upon which was a mortgage, sold to a third party a crop of wheat growing thereon, the bill of sale giving to the purchaser the right to secure and harvest the crop. Subsequently the owner of the farm, the mortgagor, executed to the mortgagee a written instrument authorizing the mortgagee to take possession of the farm, rent the same, and apply the proceeds on the mortgage. The person who purchased from the mortgagor, under the bill of sale, the growing wheat crop went upon the farm to cut the wheat, but was prevented from doing so by the mortgagee who harvested it; but the purchaser entered and carried it away. In an action of replevin by the mortgagee against the purchaser under the bill of sale it was held that the latter was entitled to the crop. There had been no sale under the mortgage. The court, in the course of its judgment, said: "Probably the right of a third person to the growing crops of grain under a contract of purchase with the owner ⁷¹ would be annulled by the sale upon the foreclosure of a mortgage of the land according to the decisions in *Shepard v. Philbrick*, 2 Denio, 174, and *Lane v. King*, 8 Wend. 584, 24 Am. Dec. 105, for then the transfer of the title to the mortgaged premises would carry with it to the purchaser a paramount title to the growing crop. But in the present case that proposition is not before us, and the title of the mortgagor to the mortgaged land was not divested or transferred to the mortgagee with the possession."

Without further elaboration, we think it perfectly clear, both upon reason and the weight of authority, that one who purchases under a bill of sale, or otherwise, a growing crop from a mortgagor, takes the risk of being deprived of the crop, if the mortgage should be foreclosed and the land should be sold under the mortgage before the crop has matured and been actually severed from the soil. The crop in the case at bar being unsevered at the time of sale, and being then actually affixed to the freehold, the purchaser of the land became, upon the ratification of the sale, entitled to the growing crop. This is the view which the circuit court took, and its judgment denying to the appellant the right to the possession of the wheat and straw under his bill of sale must be affirmed.

Judgment affirmed, with costs above and below.

GROWING CROPS ON MORTGAGED PREMISES—RIGHT TO, UPON FORECLOSURE AND SALE.—Neither a mortgagor nor his lessee, subsequent to the giving of the mortgage, is entitled to crops growing on the land at the time of foreclosure and sale; they belong to the purchaser: See note to *Crews v. Pendleton*, 19 Am. Dec. 753. Crops unsevered from land at the confirmation of a foreclosure sale become the property of the purchaser: *Relly v. Carter*, 75 Miss. 798, 65 Am. St. Rep. 621.

GROWING CROPS ON MORTGAGED PREMISES—SALE OF, PRIOR TO FORECLOSURE, AND ITS EFFECT.—A purchaser of mortgaged land at a foreclosure sale is not entitled to the ungathered crops as against a purchaser thereof from the mortgagor before the foreclosure: *Willis v. Moore*, 59 Tex. 628, 46 Am. Rep. 284. See, also, *First Nat. Bank v. Beegle*, 52 Kan. 709, 39 Am. St. Rep. 365; but compare *Aultman etc. Co. v. O'Dowd*, 73 Minn. 58, 72 Am. St. Rep. 603.

COLTON v. DROVERS' PERPETUAL BUILDING AND LOAN ASSOCIATION.

[90 Maryland, 85.]

SETOFF AGAINST RECEIVER OF INSOLVENT BANK.—If a bank becomes insolvent, a depositor therein, indebted to it on a note in a sum greater than his deposit, is entitled, as against a receiver of the bank, to set off his deposit against the amount of the note, though it did not mature until after the receiver was appointed, and without any previous demand having been made for the deposit.

SETOFF AGAINST RECEIVER OF INSOLVENT BANK—CONSTRUCTION OF STATUTE.—Notwithstanding a statute which places corporations dissolved under it on the same basis as trustees in insolvency of natural persons, a depositor in an insol-

vent bank has, as against a receiver thereof, a right, in equity at least, to set off his deposit against a note in the hands of the receiver, where the code of the state provides for the distribution of the estates of insolvents "according to the principles of equity."

SETOFF AGAINST RECEIVER OF INSOLVENT BANK—BONA FIDE PURCHASER.—A depositor's right to offset his deposit against his note to an insolvent bank, in the hands of a receiver, though such note matured after the receiver's appointment, cannot be avoided by the receiver on the theory that the latter occupies the position of a bona fide purchaser for value.

William S. Bryan, Jr., and Martin Lehmayr, for the appellants.

L. P. Henninghausen, for the appellee.

BOYD, J. A bill was filed in the court below against the South Baltimore Bank, a corporation of this state, on the twenty-fourth day of February, 1898, asking for the appointment of a receiver and that the bank be declared insolvent. An answer was filed the same day, admitting that the bank was insolvent and consenting to the appointment of a receiver. One of the appellants was appointed on that day and afterward the other was appointed coreceiver. On the first day of June, 1898, a decree was passed adjudicating the bank insolvent and determining it was so when this bill was filed. The receivers proceeded with the discharge of their duties, and in due course the case was referred to the auditor to state an account distributing the assets of the bank. When the bill was filed the bank held a promissory note of the appellee for one thousand dollars, which ⁸⁹ became due on March 2, 1898, and the appellee had a deposit with the bank of three hundred and fifty-seven dollars and twenty-five cents. At the maturity of the note the appellee tendered the receiver, then in office, the sum of six hundred and forty-two dollars and seventy-five cents in payment of said note, claiming the amount of the deposit as a setoff, and demanded the note, but the receiver refused to accept that amount. Subsequently that sum was accepted under an agreement that it should be credited on the note without prejudice to the receiver's claim for the balance, and that no suit should be instituted until it was determined whether the appellee was entitled to set off the deposit against the balance due on the note. The auditor refused to allow the setoff, but distributed to the appellee its proportionate dividend as a creditor. Exceptions were filed to the audit, which were sustained, and a decretal order was passed directing the receivers to allow the association the deposit as a setoff against the balance due on

the note. From that order this appeal was taken by the receivers with the permission of the court, it being represented that there were a number of other claims that would be affected by the decision.

The question, therefore, to be determined by us is, whether the appellee is entitled to set off the amount of its deposit with the bank, at the time of its failure, against the balance due on the note, under the circumstances we have stated. Several reasons have been assigned by the appellants in support of the position that the appellee is only entitled to receive a distribution on the amount of the deposit as other creditors are: 1. One ground relied on at the argument was that a depositor in a bank cannot maintain a suit for his deposit unless he has previously made a demand for it and that no demand was made in this case. "It is now perfectly well settled that the relation between banker and customer, who pays money into the bank, or to whose credit money is received there on deposit, is the ordinary relation of debtor and creditor": *Hardy v. Chesapeake Bank*, 51 Md. 585, 34 Am. Rep. 325. And it is equally well settled that a depositor cannot, as a general rule, maintain an action to recover his deposit ⁹⁰ until he has first made a demand for its payment: 3 Ency. of Law, 2d ed., 838. But while that is true, there may be circumstances under which no demand is necessary prior to bringing suit, and on page 839 of the volume of the Encyclopedia of Law above referred to it is said that "where the bank has suspended, or where for any other reason it would be manifestly futile to make demand, none need be made." In the case of *Planters' Bank v. Farmers' etc. Bank*, 8 Gill & J. 449, it was held that the necessity for a demand would be dispensed with by the suspension of specie payments and discontinuance of banking operations by the bank, provided those acts were known to the plaintiff and from the time of such knowledge the statute of limitations would begin to run. It would have been "manifestly futile to make demand" on the bank or the receiver for the amount of deposit, and if the appellee had sued, the fact that a demand was not previously made would not have defeated the action.

If the bank had not failed and had sued the appellee for the amount of the note, it would not have been necessary for the latter to have proven a demand for the deposit prior to the time suit was instituted by the bank. A defendant can set off against a plaintiff's demand a note of the plaintiff which matured after the commencement of the action: *Clarke v. Ma-*

gruder, 2 Har. & J. 77. As early as *Whittington v. Farmers' Bank*, 5 Har. & J. 489, our predecessors held that the defendant in an action by a bank on a promissory note against him may set off against the claim of the bank any money he has in bank, and it is not intimated that a previous demand was necessary in order to enable him to do so. The bank being a debtor to the depositor, the right to set off such deposit is within the very terms of our statute, and hence in a suit by the bank the claim for the deposit can be set off, although no previous demand for it had been made. That being so, it would seem to be clear that no demand would be necessary in order to enable the defendant to set off the amount of the deposit against a claim made by the receiver of the bank, ⁹¹ if there be no other reason for not allowing it. In *Morse on Banks and Banking* it is said "where the bank itself stops payment and becomes insolvent, the customer may avail himself in setoff against his indebtedness to the bank of any indebtedness of the bank to himself, as, for example, the balance due him on his deposit account. So, also, even though the debt to him has not matured at the time of the insolvency." This may be done whether a demand had or had not been previously made: *Fort v. McCully*, 59 Barb. 87; *Seymour v. Dunham*, 24 Hun, 93.

2. We come, then, to the main question in the case. It is argued that to allow the setoff would be, in effect, to give the appellee a preference over the other creditors of the bank, and that it is the duty of the receivers to distribute the assets pro rata and not to pay in full any one creditor. If the appellee was merely a creditor that argument might prevail, but that was not the relation that existed between the two. The appellee was not only a creditor to the amount of its deposit, but it was a debtor to the amount of the note held by the bank. Its debit was larger than its credit, and if the bank had not failed it could only have recovered the difference between the two. Do the receivers occupy any better position? The general rule undoubtedly is, that a receiver takes subject to setoffs which the defendant might have set up against the original owner: See 22 Ency. of Law, 308, and note to *Merrill v. Cape Ann Granite Co.*, 161 Mass. 212, 23 L. R. Ann. 313, where many authorities are collected. There are some exceptions to the rule, one of which may be mentioned, although not directly involved in the case, as some of the authorities cited by the appellants are to that point, and that is that a claim obtained after the commencement of the proceedings, which resulted in the appoint-

ment of a receiver, should not be allowed as a setoff unless there be some statute authorizing it to be done. In this case, however, the debt was due by the bank to the appellee before the proceedings under which the appellants were appointed were instituted. As we have seen, the relation ⁹² of debtor and creditor existed, and the question discussed above as to whether demand must be made before suit can be brought does not in anywise reflect upon the question of indebtedness, but only on the right to sue for the indebtedness before demand is made.

But it is said on behalf of the appellants that inasmuch as the note fell due after the appointment of the first receiver, he took it free from all equities, just as a bona fide purchaser for value would have done, and that a claim in favor of the bank which did not mature until in the hands of the receiver is not subject to a setoff by a claim which existed against the bank before the receiver's rights accrued. In short, that in one case the debt is due by the bank to the customer, and in the other by the customer to the receiver. If that were strictly correct there would be some ground for the contention, for if, for example, the appellee had purchased some property from the receiver, it would not be permitted to setoff its claim against such indebtedness to the receiver, for it would thereby not only obtain an unwarranted preference over other creditors, but it would prevent a proper settlement of the insolvent estate, and, moreover, they would not be mutual claims. But when the receiver was appointed he took the assets of the bank, and amongst those assets was this note. It was a debt already incurred by the appellee and payable to the bank when due. By reason of the fact that it was payable to, and held by, the bank, it was an asset that became vested in the receiver, and he took it subject to the equities existing between the appellee and the bank. Although there are some authorities to the contrary, the great weight of authority is to the effect that the fact that the claim thus held by the receiver does not mature until after his appointment does not prevent a defendant from using his claim as a setoff. Among other decisions are *Berry v. Brett*, 6 Bosw. 627; *Scott v. Armstrong*, 146 U. S. 499; *Platt v. Bentley*, 11 Am. Law Reg., N. S., 171; *In re Assignment of Hatch*, 155 N. Y. 401; *Northampton Bank v. Balliet*, 8 Watts & S. 311, 42 Am. Dec. 297; *Aldrich* ⁹³ *v. Campbell*, 4 Gray, 284; *Smith v. Spengler*, 83 Mo. 408; *McCagg v. Woodman*, 28 Ill. 84; *Armstrong v. Warner*, 49 Ohio St. 376; *Yardley v. Clothier*, 51 Fed. Rep. 506; *Skiles v. Houston*, 110 Pa. St. 254. See, also,

note to *Fera v. Wickham*, 135 N. Y. 223; 17 L. R. Ann. 456. Some of these cases make a distinction between a technical set-off in suits at law and cross-demands allowed by courts of equity, but as we are now considering a distribution in a court of equity, all of the cases can properly be referred to here.

3. But it is contended by the appellants that if it be conceded that the general rule is as we stated about the rights of the receivers, they occupy a different position by reason of our statute. Section 264a of article 23 (Act 1896, c. 349) provides that when a corporation has been determined or proven to be insolvent and dissolved in accordance with section 264, "all of its property and assets of every description shall be distributed to the creditors of said corporation in the same manner that the property and assets of an insolvent debtor are distributed under the provisions of article 47 of the code, and the date of the filing of the bill against such corporation, upon which it may be dissolved, shall be taken and treated for the purpose of determining the validity of preferences and for all other purposes, as the date of the filing of the petition in insolvency by or against a natural person." In short, receivers of corporations that are dissolved under that statute are placed on the same basis as trustees in insolvency of natural persons, and the date of filing the bill is the time fixed to determine the status of the parties affected by it. But section 11 of article 47 of the code provides that "the estates of the insolvent shall be distributed under the order of the court according to the principles of equity." While setoff in equity is generally governed by the same principles as at law, courts of equity sometimes allow a setoff where for some technical reason it could not be allowed at law. The insolvency of the party against whom it is claimed frequently affords equitable ground for allowing it. A technical ⁹⁴ setoff is wholly of statutory origin, but courts of equity exercise an original jurisdiction over the subject and will, when reason and justice require it, enforce a counterclaim, though not within the letter of the statute. *Smith v. Donnell*, 9 Gill, 84, and *Manning v. Thruston*, 59 Md. 218, are instances of such equitable relief. It would sometimes work great injustice to customers of banks if they should be required to pay in full their indebtedness to the bank and only receive a dividend on their deposits. A customer might from time to time make deposits in bank with a view to meet his note held by it, and it would manifestly be a great hardship if, under those circumstances, he could not apply his deposit toward the payment of the note because the bank had failed

and a receiver had been appointed. A court of equity would certainly not permit such unjust results in the distribution of funds before it if such facts were proven, and although in this case there is no evidence that the deposit was made with special reference to the maturity of the note, yet as it became due a few days after the receiver was appointed, it might well be inferred that the appellee had that fact in view in making the deposits. If the bank had not failed it could have applied the deposit of the appellee toward the payment of the note: 3 Ency. of Law, 2d ed., 828, 835; *Miller v. Farmers' etc. Bank*, 30 Md. 392; and it would be unreasonable to permit a receiver of an insolvent bank to collect the note in full without allowing the setoff, particularly as the bank had a lien on the deposits. "The bank holds a lien upon the deposits in its hands to secure the repayment of the depositor's indebtedness, and may enforce that lien as the debts mature, by applying the debtor's deposits upon them, thus setting the two off against each other": 3 Ency. of Law, 835; *Miller v. Farmers' etc. Bank*, 30 Md. 392. If the appellee was not financially responsible, and had attempted to assign its claim for deposits against the bank to a third person, could there have been any question about the right of the receiver to insist upon the application of the deposit to the payment of the note? ⁹⁵ Clearly not, as the assignee of the claim would have taken it subject to equities existing between the appellee and the bank, and a court of equity would have protected the bank or its representatives, the receivers: *Marshall v. Cooper*, 43 Md. 46. It would seem clear, then, that at least in equity the deposit should be allowed as a counterclaim or setoff.

But even at law it should be allowed against the receivers. It is true that a trustee appointed under our insolvent laws does not occupy precisely the same position that an ordinary trustee under a conventional deed of trust does, as he has greater powers and represents the creditors. He can, for example, have a deed made by the insolvent in fraud of his creditors set aside, which an assignee under a voluntary deed of trust cannot do, because the latter can only do what his assignor could. But the insolvent law does not vest him with such powers as would enable him to collect more than is actually due the insolvent, and there was only actually due the balance between the two accounts. "All the property of every description, rights, and claims of the insolvent" vest in the trustee, and if the insolvent has disposed of any of his property in violation of the insolvent law it is void and the trustee can recover it. It

could not be successfully contended that the creditors of an insolvent could deprive one who owes the insolvent of the right of setoff, and how can the trustee who represents them do so? Nor can he avoid the right of setoff on the theory that he occupies the position of a bona fide purchaser for value. *Haxtun v. Bishop*, 3 Wend. 13, referred to by the appellants, tends to sustain that position, but that case has not met with approval: See 17 L. R. Ann. 458, note. In *Dowler v. Cushwa*, 27 Md. 354, this court quoted with approval from *Receivers v. Patterson Gas Light Co.*, 23 N. J. L. 291, that "the rule pervades both bankrupt and insolvent laws founded on general principles of equity that all cross-demands, whether connected or independent, provided they be mutual, as between the bankrupt or the insolvent and the creditor, shall be set off, and the balance only shall be deemed the indebtedness on one side or the other. The assignees take a bankrupt's property in the same condition, and subject to the same burdens as the bankrupt himself held it, on the principle that they are not purchasers for a valuable consideration, but as voluntary assignees and personal representatives, and are therefore distinguished from particular assignees."

Although fully recognizing the distinction between the trustee of an insolvent and one appointed by the debtor in a deed of trust, as made by this court in previous cases, we cannot adopt the view urged upon us that the former is to be regarded as a bona fide purchaser for value of the assets that come into his hands, and thereby permit him to deprive a debtor of such a right as that to set off a debt due by the insolvent prior to the institution of the insolvent proceedings, and we find nothing in our statute or in the authorities we feel called upon to follow to cause us to reach a conclusion that, in our opinion, would work such manifest injustice. It is not claimed that a receiver appointed under the statute referred to can occupy any better position than an insolvent trustee, and for the reasons we have given we will affirm the order of the court appealed from.

Order affirmed, the costs to be paid out of the insolvent estate.

SETOFF OF DEPOSIT AGAINST INSOLVENT BANK.—If a bank becomes insolvent, and a receiver is appointed, or its assets are placed in the hands of commissioners for liquidation, the depositor may set off his deposit against his notes or other indebtedness to the bank. The maturity of the indebtedness due to the bank is not material: See note to *St. Paul etc. Trust Co. v. Leck*, 47 Am. St. Rep. 585, discussing setoff after insolvency.

BEELEB v. CLARKE.

[90 Maryland, 221.]

LIMITATIONS OF ACTIONS—ACKNOWLEDGMENT OF DEBT AND PROMISE TO PAY—WHEN SUFFICIENT.—Not only a promise to pay but the acknowledgment of a present subsisting debt may be implied from the language used. Hence, if an obligation barred by the statute of limitations is presented, accompanied by a demand for payment, to the maker, who says, "I cannot pay it now, as I have two members of my family now to support," there is an implied admission of a present subsisting debt and an implied promise to pay, removing the bar of the statute.

W. Irvine Cross, for the appellant.

Joseph C. Mullin and Michael A. Mullin, for the appellee.

²²⁵ **PEARCE, J.** The cause of action in this case is a promissory note for three hundred dollars, made by the appellant to the appellee April 26, 1877, and payable sixty days after date, suit having been instituted September 3, 1898. The pleas were the general issue and the statute of limitations. The case was tried before the court without the intervention of a jury, and judgment was rendered for plaintiff for the amount of the note with interest. At the trial the appellee offered the note in evidence, which he testified was in the handwriting of the appellant, and was given to secure a loan of three hundred dollars, then made, no part of which had ever been paid, though he had demanded payment on three different occasions at times and places which he named, the last time being the day before the presidential election in 1896, on pier 9 of the B. & O. R. Co., in Baltimore; that on the first two occasions the appellant simply said he was not able to pay it; that on the last occasion the appellee drew out the note, showed it to the appellant, and told him he wanted him to pay the face value of the note, and that appellant replied, "I cannot do that now, as I have two members of my family now to support." Daniel Meyler testified that he was present on the last occasion mentioned; that he had seen that note before in appellee's possession; that he saw it presented at that occasion; heard appellee ask appellant to pay him the money he owed him, and that he replied he was not in a position to pay him then. The appellant testified that he had no recollection of giving the note, but that both the body and signature appeared to be in his handwriting; that to the best of his knowledge he never borrowed any money from the appellee, and never owed him any, and that he had never seen the note until it was presented to him by Mullin,

²²⁶ as attorney for the appellee, and that the appellee never made any demand upon him for money due; but on two occasions, about four and two years before that time, had asked him for a loan of five hundred dollars, which he did not make. He was not asked whether he said he could not pay the note then because he had two members of his family to support, and his testimony embraced no denial of the use of that language. The appellee denied that he ever asked appellant for a loan, and Meyler testified that no loan was asked for on the occasion when he was present.

Upon this testimony the appellee offered the following prayer: "If from the evidence in the cause the court finds that the defendant for valuable consideration executed and passed to the plaintiff the promissory note sued on in this cause, and has not paid the same, and although from the evidence the court should find that said cause of action accrued more than three years before the bringing of this suit, yet if from the evidence the court further find that within three years before the suit the plaintiff demanded of the defendant payment of the promissory note sued on, and exhibited at the same time to the defendant the said promissory note, and the defendant, without denying or disputing the authenticity of said note, or his legal obligation to pay the same, said only, 'I cannot do it now; I have two members of my family to support,' then there is sufficient evidence in the cause to relieve the said cause of action from the bar of the statute of limitation pleaded by the defendant."

And the appellant offered two prayers, the substance of the first being that there was no evidence legally sufficient to show an acknowledgment within three years before the suit, either of the note sued on or of any existing indebtedness whatever at the time of the acknowledgment claimed; and the second, that there was no evidence legally sufficient to remove the bar of the statute of limitations. The court granted the plaintiff's prayer, and refused the two prayers of the defendant, to which ruling the defendant excepted, and has brought this appeal.

²²⁷ Appellant's counsel has addressed to the court a most ingenious and interesting argument, one which might have much weight if we had to determine here for the first time what is a sufficient acknowledgment to take a case out of the act of limitations, but as was said by Chief Justice Le Grand, in *Quynn v. Carroll*, 10 Md. 208: "The statute of limitations has ever been a fruitful source of doubt and discussion, and the decisions in regard to it, both in this country and in Eng-

land, various and contradictory. This being so, whenever it is found that the question presented in the particular case, for the time under consideration, has been settled by the adjudications of the appellate court of this state, such adjudications ought to be followed, whatever may have been the decisions elsewhere." And looking to the decisions in this state, we cannot doubt that the ruling of the learned judge of the superior court in this case was entirely correct. It may, perhaps, be conceded that the principles announced in the leading case of *Oliver v. Gray*, 1 Har. & G. 204, are more liberal to indulgent creditors than might be deemed wise at this day when parties in interest are permitted to testify, and those principles are so often made available to defeat the salutary policy of the statute as a statute of repose; but that decision has been too frequently and too emphatically affirmed by our predecessors and by ourselves to permit us now to depart from it, as we must do, if we should reverse this decision. In *Shipley v. Shilling*, 66 Md. 563, it is said: "The principle is now well settled, in this state at least, that where a debt is admitted to be due, the law raises by implication a promise to pay it; and it is, therefore, immaterial whether the promise be made in express terms or be deduced from an acknowledgment as a legal implication, as in either case the effect is the removal of the bar of the statute and the restoration of the remedy on the original demand." In *Keplinger v. Griffith*, 2 Gill & J. 301, it was held that the language used by the defendant "was a clearly implied admission that the debt remained due and unpaid, and the excuse ²²⁸ alleged for not paying it furnished no real objection to the payment of it, if true." It is, therefore, clear in this state that not only the promise to pay, but the acknowledgment of a present subsisting debt, may be implied from the language used. Here the appellant is confronted with an obligation which he admits not only to have been signed but to have been written by himself, and when the obligation is presented, accompanied by demand for payment, he says, "I cannot pay it now, as I have two members of my family now to support." Upon the authority of *Keplinger v. Griffith*, 2 Gill & J. 301, this constitutes an implied admission of a present subsisting debt, and being unaccompanied by any qualification which, if true, would exempt him from any moral obligation to pay, it raises an implied promise to pay, and removes the bar of the statute. This case, however, is stronger than *Keplinger v. Griffith*, 2 Gill & J. 301, because the use of the word "now" twice occurring suggests the purpose of future

payment when the disabilities now existing may be removed. At the last term of this court in the case of *Babylon v. Duttera*, 89 Md. 444, we applied this rule without relaxation, holding that a declaration of a defendant that if he had known certain notes would have been assigned he would have paid them off was sufficient to remove the bar of the statute.

Judgment affirmed, with costs above and below.

LIMITATIONS OF ACTIONS—ACKNOWLEDGMENT—PROMISE TO PAY.—An acknowledgment sufficient to remove the bar of the statute of limitations must contain a clear and unequivocal acknowledgment of the debt, and an express or implied promise to pay it: *Ward v. Jack*, 172 Pa. St. 416, 51 Am. St. Rep. 744. A new promise is implied from a general unqualified acknowledgment of a debt: *Custy v. Donlan*, 159 Mass. 245, 38 Am. St. Rep. 419; and see *McCormick v. Brown*, 86 Cal. 180, 95 Am. Dec. 170.

BROWN v. EDISON ELECTRIC ILLUMINATING CO.

[90 Maryland, 400.]

ELECTRIC LIGHT COMPANIES—INSULATION OF WIRES—NEGLIGENCE.—It is the duty of an illuminating company, using electric light wires charged with a high-tension current, to see that its wires, when strung where persons are liable to come in contact with them, are properly placed with reference to the safety of such persons and are properly insulated. Hence, if it runs such a wire into a store, but leaves it defectively insulated at points less than one foot from the front of the building, and a boy is injured by coming in contact therewith while cleaning the roof over a projecting window, there is strong *prima facie* evidence of negligence on the part of the company, which should be submitted to the jury.

William Colton and H. Tebbs, for the appellant.

John P. Poe, C. Hopewell Warner, and Edgar Allan Poe, for the appellee.

404 SCHMUCKER, J. The action in this case was brought against the appellee for damages sustained by the equitable appellant from coming in contact with an electric light wire charged with a high-tension current. The evidence introduced by the plaintiff tended to prove the following state of facts: The equitable appellant, who, at the time of receiving the injury complained of, was a boy eleven years old, was employed by one Burt, the proprietor of a store at No. 314 W. Pratt street, Baltimore, to clean up the store and discharge other minor duties. There was a roof covering the front window to the store about

two feet six inches wide, which extended across the entire front of the building just below the second-story window. An open rainspout or gutter ran along the front edge of this roof and discharged its contents by a downspout attached to the front of the building.

The electric light current was introduced to the store by two primary wires extending from a pole, standing some ⁴⁰⁵seventy-five feet easterly from the building, to glass insulators which were attached by iron brackets about six inches long to the easternmost end of the small roof of which we have spoken. From the insulators the wires passed into a fuse-box and then into a converter, from which the current was carried by secondary wires into the store. The primary wires from the pole to the converter were charged with a current of one thousand volts, which is highly dangerous, if not fatal, to the life of anyone coming in contact with the naked wire; but the secondary wires extending from the converter into the store were only charged with the comparatively harmless current of fifty volts. The primary wire from the pole to the insulator nearest the house, and not more than six inches from it, was jointed just beyond the insulator, and at the time of the accident the point of the jointed wire was left sticking up and entirely uncovered. The same wire was exposed naked by reason of defective insulation at two other places about two or three inches beyond the insulator.

On June 5, 1897, the equitable appellant, by direction of his employer, went upon the roof which covered the store window for the purpose of cleaning it and the rainspout attached to it. He was seen, by a passer-by, on his knees upon the roof apparently cleaning the gutter, and shortly afterward he was found lying insensible upon the roof with his head in contact with the exposed joint in the primary electric light wire nearest to the house. The flesh of his head was burning at the point of contact with the wire when he was found, and he was otherwise injured by the electric current which passed into his body from the wire. No one witnessed the accident, but the appellant himself testified that he was stooping over the edge of the roof at its eastern end, resting on his left hand while endeavoring with his right hand to remove a ball which had lodged in the downspout, when his left hand slipped and he immediately became unconscious.

There was also evidence tending to show that the primary ⁴⁰⁶wire, which was constantly charged with the deadly current, was not covered with the most approved and effective insulat-

ing material even where it ran in close proximity to the front of the house.

At the conclusion of the plaintiff's testimony the court, upon application of the defendant, took the case away from the jury on the ground that there was no legally sufficient evidence to entitle the plaintiff to recover.

The appellee was engaged in supplying electric light to streets and houses by means of a current of so high voltage that the business in which it was thus engaged was in the highest degree dangerous to all persons liable to come into contact with the wires which carried the current. These wires were strung on poles erected in the streets of a large city which were likely to be at all times occupied, and at many times crowded with persons lawfully passing through them. The same dangerous current was, in the course of the business, conducted by wires strung from the poles standing along the curbstone, across the sidewalk to the houses to be lighted by it. Outside of any contractual relation between the parties to this suit the very nature of the business thus conducted by the appellee imposed upon it a legal duty toward every person who, in the exercise of a lawful occupation in a place where he had a legal right to be, was liable to come in contact with the wires charged with this invisible but deadly power. This duty has been recognized and enforced by the court in many cases in this state and elsewhere.

As applied to the management by the appellee of its wires charged with the high-tension current, this legal duty would require it to see that its wires, when strung where persons were liable to come in contact with them, were properly placed with reference to the safety of such persons and were properly insulated: *Western Union Tel. Co. v. State*, 82 Md. 311, 51 Am. St. Rep. 464; *Ennis v. Gray*, 87 Hun, 356; *Griffin v. United Electric Light Co.*, 164 Mass. 492, 49 Am. St. Rep. 477; *Mackay v. New York etc. R. R. Co.*, 35 N. Y. 75; *Overall v. Louisville Elec. Light Co.* (Ky., Oct. 18, 1898), 47 S. W. Rep. 407 442; *Perham v. Portland Gen. Elec. Co.*, 33 Or. 451, 72 Am. St. Rep. 730; *Reagan v. Boston Elec. Light Co.*, 167 Mass. 406.

In the present case the wire charged with the deadly current was carried by the system of construction adopted by the appellee to within six inches of the front of the house to be lighted, and was then attached to an insulator quite near the bottom of the easternmost second-story window, and but a few inches from the end of the roof on which the appellant was injured. In view of the number of lawful purposes, such as

painting, repairing, and cleaning, for which persons might be required to labor upon the roof in question or upon the front of the house or of the adjoining house, the propriety of bringing the high-tension wire so near to the house may well be questioned. The evidence indicated that the converter which reduced the strength of the current and robbed it of its fatal character might have been placed upon the pole and a low-tension and harmless current have been carried from the pole to the house.

If the witnesses are to be believed, the insulation of the high-tension wire at the time of the accident was defective at several places within less than one foot from the front of the house. The evidence is that the exposed point on which the appellant was injured was not over seven inches from the roof on which he was working. In *Western Union Tel. Co. v. State*, 82 Md. 311, 51 Am. St. Rep. 464, where the defective insulation of an electric supply wire permitted an unused telephone wire, which fell across it and reached the pavement, to become so heavily charged with electricity that it killed a child on the street who came in contact with it, we held that it was the plain duty of the company not only to properly erect their plants, but to maintain them in such condition as not to endanger the public. We also held in that case that if the property of the defendant was not in proper condition, and by reason thereof the plaintiff was injured, those facts alone, in the absence of other evidence to show that the defect originated without the fault of the company, afford *prima facie* presumption of negligence. The doctrine there announced applies with equal force to the present case.

⁴⁰⁸ There were no eyewitnesses to the occurrence of the accident, and the appellee strongly contended that the evidence failed to show that either the condition or the arrangement of the wires was the cause of the injury to the appellant, and relied in that connection on *Baltimore etc. R. R. Co. v. Abbott*, 75 Md. 158, 32 Am. St. Rep. 372, *Baltimore etc. R. R. Co. v. State*, 71 Md. 599, and *Cumberland etc. R. R. Co. v. State*, 73 Md. 75, 25 Am. St. Rep. 571. An examination of those cases shows that there is a plain distinction between them and the one now under consideration, in this, that no one of those cases presented such a *prima facie* presumption of negligence against the defendant as the present one does. In *Baltimore etc. R. R. Co. v. Abbott*, 75 Md. 158, 32 Am. St. Rep. 372, there was no evidence at all of negligence on the part of the defendant. In each of the other cases the person killed was a trespasser

on the track of the railway by whose train he was struck. In *Cumberland etc. R. R. Co. v. State*, 73 Md. 75, 25 Am. St. Rep. 571, there was also some evidence indicating that the boy who was killed had attempted to board the cars while they were in motion and the condition of the body when found gave color to that view of the case; and in *Baltimore etc. R. R. Co. v. State*, 71 Md. 599, there was evidence tending to show that the boy who was killed stumbled and fell against the pilot of the engine while running between the north and south tracks of the railroad. In the case at bar, the boy was engaged in a lawful occupation at a place where he was entitled to be when he was injured, and there is no evidence showing a want of care on his part. If his own evidence is to be believed, the injury would not have occurred if the wires of the appellee had been properly insulated or if the high-tension current had not been brought so near to the house.

We think the case presented such strong prima facie evidence of negligence on the part of the appellee that it should not have been taken from the jury.

Judgment reversed and cause remanded.

ELECTRIC LIGHT COMPANIES—INSULATION OF WIRES—DUTY—NEGLIGENCE.—If electric companies fail to properly insulate their wires, and one lawfully on a roof, engaged in work requiring him to risk coming in contact with the wires, is injured, he is entitled to damages, and no presumption of contributory negligence will be indulged. It is the duty of such companies to keep their wires properly insulated: *Clements v. Louisiana Electric Light Co.*, 44 La. Ann. 692, 32 Am. St. Rep. 348; *Griffin v. United Electric Light Co.*, 164 Mass. 492, 49 Am. St. Rep. 477. Compare *Hector v. Boston Electric Light Co.*, 174 Mass. 212, 75 Am. St. Rep. 300. It is the duty of such companies to exercise the utmost care to prevent injury to persons coming in contact with their wires, and whether this duty has been performed in a given case is ordinarily for the jury: *Perham v. Portland Electric Co.*, 33 Or. 451, 72 Am. St. Rep. 730.

SUMMERS v. BEELER.

[90 Maryland, 474.]

RESTRICTIVE COVENANTS—ENFORCEMENT OF.—The right of grantees from a common grantor to enforce, inter sese, covenants entered into by each with such grantor is confined to cases where there is proof of a general plan or scheme for the improvement of property, and its consequent benefit, and there is evi-

dence of the covenant in question having been entered into for the benefit of other lands conveyed by the same grantor. Such covenants cannot be enforced by a plaintiff against a defendant, between whom there is no privity, either of contract or estate.

RESTRICTIVE COVENANTS AS TO BUILDING LINE—ENFORCEMENT OF, BY PURCHASERS INTER SESE.—If some lots of a platted tract of land in a city are conveyed by the owner without any restriction as to a building line, while others conveyed by the same grantor do have such a restriction the grantees of the latter lots cannot enforce such restriction inter sese, without showing that it was part of a general scheme for the benefit of all the purchasers.

RESTRICTIVE COVENANTS AS TO BUILDING LINE—ENFORCEMENT OF, BY PURCHASERS INTER SESE—BAY-WINDOW—INJUNCTION.—If, after certain lots of a platted tract of land in a city are conveyed by the owner, some with restrictions to be observed as to a building line, and others with no such restrictions, one lot is conveyed with such a restriction, but with no servitude imposed by the deed on an adjacent lot, facing the same street, retained by the grantor, and such adjacent lot is afterward sold by the same grantor, with a like restriction, the grantee of the former lot cannot restrain the grantee of the latter lot from building a bay-window beyond the building line, where there was nothing in the recorded map, or in the description of the lots accompanying it, showing any restriction, and where such restrictions in the deeds to prior purchasers were treated by them, both by their own violations thereof and their failure to resist violations by other purchasers, as not made for the common benefit of all the purchasers.

Bill by Summers and wife against Beeler and wife. The restriction referred to in the deed to Summers and in the deed to Beeler sufficiently appears from the opinion.

A. A. Doub, Daniel W. Doub, and Frank B. Bomberger, for the appellants.

A. C. Strite, for the appellees.

476 **PEARCE, J.** This is a bill in equity filed by the appellants to restrain the appellees from erecting upon their own premises, adjoining those of the appellants, a bay-window, in violation, as the appellants claim, of restrictions contained in conveyances for their respective premises from a common vendor, to whom their titles are traced through mesne conveyances. A preliminary injunction was granted, and was dissolved upon hearing, and thereupon this appeal was taken.

Rev. C. L. Keedy, being the owner of a tract of land in Hagerstown, on the east side of Mulberry street, laid out the tract into twenty-eight lots, fourteen of which fronted on Mulberry street, and fourteen extended back eastward, fronting on King street, as shown in the accompanying plat, which was recorded

EAST ANTIETAM STREET.			
SOUTH MULBERRY STREET.	49 ft.	140 ft. No. 1 No restriction.	49 ft.
	41 ft.	2 No restriction.	41 ft.
	41 ft.	3 No restriction.	41 ft.
	41 ft.	4 Restriction to building line of 3 and 5.	41 ft.
	41 ft.	5 No restriction. 1st house built.	41 ft.
	41 ft.	6 Restriction.	41 ft.
	41 ft.	7 Restriction to line of house already built.	41 ft.
	41 ft.	8 Restriction. 2nd house built. Bay window.	41 ft.
	41 ft.	9 Restriction.	41 ft.
	41 ft.	10 Restriction to west wall of house on No. 5.	41 ft.
	41 ft.	11 Restriction. Plaintiff's lot.	41 ft.
	41 ft.	12 Restriction.	41 ft.
	41 ft.	13 Restriction.	41 ft.
	49 ft.	14 No restriction. Porch extending beyond line. 140 ft.	49 ft.
EAST BALTIMORE STREET.			
ALLEY, 10 ft.		KING STREET.	
		140 ft.	No. 28
		27 °	
		26	
		25	
		24	
		23	
		22	
		21	
		20	
		19	
		18	
		17	
		16	
		15	
		140 ft.	

among the land records of Washington ⁴⁷⁸ county, but without anything thereon, or in the description of the lots which accompanied the plat, to indicate any restrictions upon the use of the lots or any of them. In the subsequent sale and conveyance of these lots fronting on Mulberry street, certain restrictions as to the building line to be observed were inserted in some of the deeds, while in others there were no restrictions whatever. Lots 1, 2, 14, 3, and 5 were the first sold, and in the order named, without any restriction as to their use. These conveyances were all made between June 28, 1888, and November 23, 1888.

Lot 5 was conveyed to C. P. Mason and W. M. Keedy, and the first house built upon any of the lots was erected here in the spring of 1889, standing back eight feet from the east line of Mulberry street. On No. 1 a church has been built with a covered vestibule, extending beyond the eight-foot line. On No. 2 three dwellings have been built, each with a two-story bay-window, extending beyond the eight-foot line. On lots 7, 10, and 14, houses have been built, each with a one-story front porch extending beyond the line. On lot 8 a house was erected in 1889, the front wall of which is on the eight-foot line, with an inclosed porch, making it a one-story bay-window, extending beyond the line. All the other houses on the Mulberry street lots have steps extending beyond the eight-foot line. All these lots, except 1, 2, 14, 3, and 5 were sold and conveyed with substantially the same restriction as to building, that is, "that no building or other improvement shall be located, built or constructed upon said lot closer to the west marginal line thereof than a line running parallel thereto and bounding the west wall of the house owned by C. P. Mason and William M. Keedy upon lot No. 5."

No. 11 is owned by Mrs. Summers, one of the appellants, and No. 10 by Mrs. Beeler, one of the appellees, who is now building a house thereon with a bay-window, extending three feet beyond the line of the Mason and Keedy house on No. 5, to which she is limited by the original conveyance ⁴⁷⁹ of her lot No. 10, and the appellants are seeking to restrain the erection of this bay-window. Lot 11 was originally conveyed to the Danzer Lumber Company by deed dated January 2, 1890, containing the restriction above mentioned, and the title thereto has passed to Mrs. Summers by mesne conveyances, each of which refers to the restriction in the original deed. Lot 10 was originally conveyed to Norman B. Scott by deed dated

purchasers, and to be for the benefit of each purchaser, and the party has bought with reference to such general plan or scheme, and the covenant has entered into the consideration of his purchase." In that case the court proceeded to say "the only fact which appears is, that the same covenant is incorporated in the deeds of the complainant and defendant, and that Mr. Roberts has inserted the same covenant in each deed he made conveying any portion of the property. This has been held not sufficient evidence of the covenant having been entered into for the benefit of other lands conveyed by the same grantor"—citing in support of this position *Jewell v. Lee*, 14 Allen, 145, 92 Am. Dec. 744; *Sharp v. Ropes*, 110 Mass. 381; *Keates v. Lyon*, 4 ⁴⁸² Ch. App. 218; *Renals v. Cowlshaw*, L. R. 11 Ch. Div. 866. In the present case, the facts are not nearly so strong as in *Mulligan v. Jordan*, 50 N. J. Eq. 363, because here Mr. Keedy conveyed five of the fourteen lots sold without any restrictions whatever.

In *Nottingham Brick etc. Co. v. Butler*, L. R. 15 Q. B. Div. 268, Justice Wills says: "The principle which appears to me deducible from the cases is, that where the same vendor, selling to several persons plots of land, parts of a larger property, exacts from each of them covenants imposing restrictions upon the use of the plots sold, without putting himself under any corresponding obligation, it is a question of fact whether the restrictions are merely matters of agreement between the vendor himself and his vendees, imposed for his own benefit and protection, or are meant by him, and are understood by the buyers, to be for the common advantage of the several purchasers. If the restrictive covenants are simply for the benefit of the vendor, purchasers of other plots of land from the vendor cannot claim to take advantage of them. If they are meant for the common advantage of a set of purchasers, such purchasers and their assigns may enforce them inter sese for their own benefit." That case was a sale of a parcel of land in 1865 in thirteen lots to different purchasers, with covenant by each restricting the use of the land as a brickyard. Defendant subsequently bought lot 11, but his deed contained no restriction. In 1882 plaintiff contracted to purchase lot 11, and paid a deposit, but, on discovering the restrictive covenant, claimed to rescind the contract and sued for the deposit, and it was held that, if the contract were executed, he would be bound by the restrictive covenants; that the owners of the other twelve lots could enforce them against him and each other, and that he was entitled to rescind

and recover the deposit. On appeal Lord Esher, M. R., said Justice Wills was perfectly correct, and that "the question whether it is intended each of the purchasers shall be liable, in respect of those restrictive covenants to each of the other purchasers, is a question of fact to be determined ⁴⁸³ by the intention of the vendor and of the purchasers, and that question must be determined upon the same rules of evidence as any other question of intention." In that case the property was put up at auction in 1865 in thirteen lots, and one of the publicly announced conditions of sale was that no lot should be used as a brickyard. At that time lots 1 and 2 were sold. In February, 1866, there was a second auction, at which lots 6, 7, and 8 were sold, and in October, 1867, there was a third auction at which lots 9 and 10 were sold, and the evidence showed that all these were sold on the same terms. Lots 3, 4, and 5 were sold respectively in 1865, 1866, and 1867 at private sale, but there was no direct evidence as to the terms on which they were sold, the deeds for these not being produced. Lot 11 was sold at private sale September 4, 1866, and the deed contained the restrictions mentioned at the auction. Lot 13 was sold at private sale in June, 1866, with the same restrictions. These restrictions, among other things, required that all buildings erected should be of a uniform stone color, with slate roofs, and should cost not less than four hundred pounds each, and the proof was that every house built conformed to these conditions. Upon this state of proof the court could reach no other logical or rational conclusion than that the vendor intended, and the purchasers understood, that the covenants should inure to the benefit of every purchaser, and that they entered into the consideration of every purchase. But in the case before us, though Mr. Keedy took the pains to record before sale a plat of the land and a description of the lots, he nowhere mentioned any restrictions or conditions as to their use. There was no auction sale at which such restrictions or conditions were made known to the public, nor was such announcement made in any other manner. Not only so, but the five lots first sold were sold without any restrictions, and the purchasers of all the other eleven lots on Mulberry street (which were sold with restrictions) except Mrs. Summers', have treated these restrictions as not made for the common ⁴⁸⁴ benefit of all these purchasers, both by their own violation of these restrictions, and by their failure to resist similar violations by the other purchasers. We think, therefore, the conduct both of

the vendor and of the purchasers forbids the conclusion that their intent and understanding was that these restrictions were part of a general plan or scheme for the benefit of all the purchasers.

The cases chiefly relied on by the appellant do not sustain his contention in this case. Thus in *Tallmadge v. East River Bank*, 26 N. Y. 105, a plat was filed and recorded showing that every house to be built was to be set back eight feet from the street. In *Trustees etc. v. Lynch*, 70 N. Y. 449, 26 Am. Rep. 615, an agreement showing restrictions as to all the lots was recorded, and the defendant's purchase was made with express reference and subject to this agreement. It was strenuously contended that the case of *Clark v. Martin*, 49 Pa. St. 289, repudiated the necessity of a general plan in cases like the present, and having been approved by this court in *Thruston v. Minke*, 32 Md. 487, and *Halle v. Newbold*, 69 Md. 270, sustained the appellant's contention. But we do not so understand that case. The language used by the court, and relied on here by the appellant, is as follows: "It was objected at the argument that this remedy applies only as a means of compelling an observance of the terms involved in a general plan of lots, and this element actually exists in about half of the cases just cited; yet they are not decided on that consideration. It is not because a plan is deranged that the court interferes, but because rights are invaded, or about to be; and this fact may exist in a plan of two lots as well as in one of two hundred. The plan often furnishes the proof of the terms on which sales were made, but the fact of the alleged terms is as effective when proved by a single deed as when proved by a plan." It is manifest from this language that the Pennsylvania court is in full accord with the English chancery court in holding that the question is one of fact, to be determined by the intention of the vendor and of the purchasers, and that it is to be determined upon the same⁴⁸⁵ rules of evidence as other questions of intentions. In the Pennsylvania case there were but two lots under consideration, and the intention of the parties was as clearly shown by the one deed imposing restrictions upon one lot for the benefit of the other, retained by the vendor, as it could have been by a plan describing the two lots, and detailing the conditions to be imposed on one for the benefit of the other.

The case of *Sharp v. Ropes*, 110 Mass. 381, is more closely analogous to the present case than any to which we have been referred. Heath laid out a parcel of land in eleven lots, five

of which fronted on the north side of Gordon street and one on the south side of the same street. A plat was recorded showing the area and description of each lot, but making no reference to any restrictions upon their use. Three of the five lots on the north side of the street were conveyed by Heath, subject to the condition that no house should be built thereon within twenty feet of Gordon street. The other two lots on the north side and the one lot on the south side were conveyed without any restrictions. The plaintiff's deed was prior in point of time to defendant's deed, and both were subject to the restriction mentioned. Defendant began the erection of a house within twenty feet of the street, and plaintiff applied for an injunction, which was refused, the court saying: "There is nothing from which we can infer that the restriction in defendant's deed was intended for the benefit of the estate now owned by the plaintiff. No such purpose can be gathered from the plan. Neither of the deeds under which these parties respectively claim purports to give to the grantee any such right against any other grantee. The burden of proof is upon the plaintiff if she insists upon giving to that condition any wider application, and that burden we do not find she has sustained." A very elaborate and able review of all the leading American and English cases on this subject will be found in *De Gray v. Monmouth Beach Club House Co.*, 50 N. J. Eq. 329, ⁴⁸⁶ fully sustaining the conclusions of the learned judge of the circuit court.

For the reasons stated the decree of the circuit court is affirmed, with costs to the appellee in both courts.

COVENANTS RESTRICTING THE USE OF LAND—ENFORCEMENT OF—BUILDING.—The violation of a restriction contained in a deed as to building upon land conveyed cannot be restrained by the purchaser of another part of the land, in the absence of anything to show that there was any general building plan or uniform system of improvement intended by the grantor; but, if the restriction is inserted in pursuance of a general plan or purpose of the grantor, which regards the mutual advantage of all the lots in the hands of the several future owners, each would have an interest in the provision entitling him to enforce it: *Note to Jewell v. Lee*, 92 Am. Dec. 748. Compare the monographic note to *Ladd v. Boston*, 21 Am. St. Rep. 494, 498, 499, on covenants restricting the use of land.

COLTON v. MAYER.

[90 Maryland, 711.]

RECEIVERS — ENFORCEMENT OF STOCKHOLDER'S STATUTORY LIABILITY.—A shareholder's statutory liability for the "debts and liabilities" of a corporation is exclusively for the benefit of creditors, and is not an asset of the corporation. Hence, a receiver of an insolvent bank, unless expressly authorized by statute, cannot enforce such liability against the corporation, for he has no interest therein. The creditors alone can enforce it.

George R. Willis, William S. Bryan, Jr., Joseph W. Hazell, and Martin Lehmayr, for the appellants.

Albert S. J. Owens, for the appellee.

711 BOYD, J. The appellants, who are receivers of the South Baltimore Bank, sued the appellee, who was a stockholder in that bank, to recover a sum equal to the par value of the stock held by him, under a provision in the charter, as amended by chapter 294 of the acts of 1888, which is as follows: "The continuance of this corporation shall be on the condition that the stockholders and directors of this corporation shall be liable to the amount of their respective share or shares of stock in this corporation, for all of its debts and liabilities upon note, bill, or otherwise." The declaration alleges that the appellants were appointed by the circuit court, No. 2, of Baltimore city, under a general **712** creditors' bill filed against the corporation, which, after due proof, was adjudged to be insolvent and was dissolved, and its property was, in accordance with the terms of the act of 1896, chapter 349, vested in the appellants; it recites the above provision in the charter and alleges that the assets of the corporation are totally insufficient to pay its debts and liabilities in full, and it is necessary to call upon the stockholders and directors to pay to the receivers a sum equal in amount to the par value of the share or shares of stock held by them; that such payment will not enable all of said debts or liabilities to be discharged, and that the court had made a call upon each stockholder to pay such sum, and authorized the plaintiffs to sue therefor. The defendant demurred to the declaration, and the first six counts having been withdrawn, the court below sustained the demurrer to the seventh count and a pro forma judgment was entered for the defendant. From that judgment this appeal was taken.

The principal question intended to be raised by the demurrer was whether the receivers are authorized to sue a stockholder

of the bank for the liability thus created by the charter. Although that provision is in the language of section 27 of article 11 of the code, relating to banks organized under the laws of this state, this precise point has not heretofore been before this court. We have had many cases before us involving the liability of stockholders for unpaid subscriptions to capital stock, and we have sustained the right of receivers to sue for them, but they are assets and are such debts as the corporations themselves can recover, and hence when receivers are appointed to wind up their affairs, the right to unpaid subscriptions is vested in them. Our general corporation laws, in section 269 of article 23 of the code, provides that "where receivers of the estate or effects of any corporation shall be appointed by a court, upon or before the dissolution of any corporation, they shall be vested with all the estate and assets of every kind belonging to such corporation," and they are required ⁷¹⁸ to proceed to "wind up the affairs of such corporation," under the direction of the court, and are given "all powers which shall be necessary for that purpose." By section 264a (Act 1896, c. 349), under which these receivers are acting, it is provided that when a corporation is dissolved as therein mentioned "all of its property and assets of every description" shall be distributed to the creditors in the same manner as the property and assets of an insolvent debtor are distributed under our insolvent laws, and the receiver is authorized to maintain suits and proceedings to set aside preferences and void or fraudulent transfers, payments, etc., as the permanent trustee of an insolvent debtor can do. There is therefore no difficulty in the way of a receiver suing for any part of the estate, property, or assets that belonged to the corporation, and he is authorized, by the statute last mentioned, to maintain suits and proceedings to set aside preferences and void or fraudulent transfers, payments, etc., even when the corporation itself could not have done it, if it had not gone into the hands of a receiver. But our law does not authorize a receiver to recover any estate, property, or assets that never did belong to the corporation, but only such as it was entitled to when he was appointed, or such as had belonged to it but had been disposed of contrary to law.

Inasmuch as this charter does not expressly authorize the receivers to sue, the test of their right to do so is to ascertain whether it gave the corporation any property or estate in this liability of the stockholders, or in any manner made it an as-

set of the bank, for, unless it did, it is clear that they cannot maintain this suit against the defendant on the mere ground that he was a stockholder. When the charter says that the stockholders and directors of this corporation shall be liable to the amount of their respective shares of stock "for all of its debts and liabilities," to whom were they to be so liable? Clearly, not to the corporation for its own debts and liabilities, but manifestly they were to be liable to the creditors. When the stockholders subscribed ⁷¹⁴ for stock they assumed a two-fold obligation—one to the corporation, for the amount of the stock so subscribed, and the other to the creditors, to be limited by that amount. When they paid the corporation for their stock, their obligation to it was at an end, but not so with that to the creditors. There was no liability of any kind to the corporation by reason of this provision in the charter, and at no time from its organization to its dissolution could it have demanded one penny from the appellee on account of it. It was in the nature of a guaranty to the creditors that, in the event of the failure of the corporation to pay its debts and liabilities, each stockholder would contribute toward their payment, to the extent of the par value of stock held by him, but the corporation itself had no authority, under that provision, to assess the stock or to call for more than its par value to meet its obligations. There can, therefore, be no valid reason why a receiver of a corporation should be permitted to collect from the stockholders debts which they never owed the corporation and which should go to the creditors, if due at all, without being charged with fees and expenses incident to the settlement of insolvent estates. Some liability similar to this is generally fixed by statute upon the owners of stock in banking and other corporations that earn their profits out of the money of others, and it is sometimes provided, as in the case of national banks, for example, that in the event of failure the receiver can collect what is due on the statutory liability, but, in the absence of some law giving him the right to do so, we cannot understand upon what principle he can maintain a suit on a statute such as we have before us. It is said it would be more convenient and more equitable to permit the receivers to collect the fund thus due by stockholders and distribute it equally amongst the creditors entitled to it. But courts would not be justified in taking the fund from those entitled to it (the creditors) simply for convenience of distribution, and under the decisions of this court that reflect upon the question, it would

greatly embarrass ⁷¹⁵ the distribution of an estate of an insolvent corporation to place the funds thus derived in the hands of a receiver for distribution. The only case in which this court has had a similar statute before it is that of *Hammond v. Straus*, 53 Md. 1. There a creditor was suing an alleged stockholder to recover for the personal liability of the defendant under a statute like this. Judge Alvey, in delivering the opinion of the court, said: "To entitle the plaintiff to recover in this action it was essential that three things should be made to appear: 1. That a corporation, such as that alleged, should have been created; 2. That the defendant was a stockholder therein; 3. That the plaintiff was a creditor of the corporation, and that he became such while the defendant was a stockholder." The court below took the case from the jury, and this court, after discussing the question as to whether there was such a corporation as was alleged, proceeded with the next inquiry, which was thus stated, "Should the existence of the corporation be found, the next question is, whether the defendant was a stockholder therein at the time the debt was contracted with the plaintiff," and, having found that there was evidence that he was, reversed the case and awarded a new trial. In *Matthews v. Albert*, 24 Md. 535, where a stockholder was sued for his personal liability under the statute then in force, which made stockholders liable to the amount of stock held by them for debts of the corporation until the capital stock was fully paid up, our predecessors said that the stockholders "occupied the twofold relation of debtors to the company for the amount of their stock at par value, and as debtors, under the statute, to the creditors of the company to an amount equal to their stock for all debts and contracts created while they were stockholders." It is true that case involved the construction of a statute different from the one now before us, but the character of the liability was the same, the main difference being that under it the stockholders were relieved from their obligations to creditors when all of the capital stock was paid. In *Basshor* ⁷¹⁶ *v. Forbes*, 36 Md. 154, which was also a suit under the last-mentioned statute, it was held that a creditor could waive the individual liability of the stockholder by agreeing, when the contract was made, to look to the company alone and exclusively. Thus we see that the liability of the stockholders is only to those who became creditors while the former held the stock, and those creditors can relieve them of all such responsibility when the debts are contracted. One stockholder might

be liable to one creditor, another to some other creditor, and the creditors may have released others. It would therefore be very difficult, if not impossible, in some cases to properly determine, in the distribution of the estate, how the funds collected from the various stockholders should be distributed, and it might require many accounts to be stated. Those authorities and others to the same effect not only show how inconvenient and inequitable it would be to permit the receivers to recover, but go very far toward showing that they are not the proper parties to sue on the liability imposed by a statute such as the one now under consideration.

Some stress was laid at the argument on the fact that these receivers are vested with the powers of a permanent trustee under our insolvent laws, but could it be successfully contended that, if the debts of an insolvent individual were guaranteed, the trustee could recover from the guarantors the amount of such guaranty and distribute it as a part of the insolvent estate? Unquestionably not, and why should the receivers, who are to distribute the property and assets of the corporation in the same manner as the property and assets of an individual debtor are distributed, be permitted to recover, from those who stand somewhat in the position of guarantors, that which they never owed or guaranteed to the corporation or receivers?

Under this charter, the liability is directly to the creditors, and not to the receivers for the benefit of creditors. It was said, in passing on the liability under the statute we have referred to above, in *Norris v. Wrenchall*, 34 Md. 492: ⁷¹⁷ "It is a debt under the statute due from the stockholder to the creditor, springing out of and coexistent with the contract between the corporation and the creditor." And all the cases that have been decided in this state affecting the statutory liability of stockholders have been to the same effect. There are many authorities elsewhere in which the enforcement of such liability has been considered, and most of them hold that the receivers cannot sue under statutes such as this. The text-writers, so far as we have seen, are practically unanimous in the conclusion that such statutory liability is not a corporate asset and receivers cannot sue, unless so authorized by the terms of the statute. In 1 *Cook on Stock and Stockholders*, section 218, the principle is thus announced: "The statutory liability of the stockholder is created exclusively for the benefit of corporate creditors. It is not to be numbered among the assets of the corporation, and the corporation has no right or interest in it.

It cannot enforce it by an assessment upon the shareholders. Nor can the corporation, upon the insolvency, assign it to a trustee for the benefit of creditors. It is a liability running directly and immediately from the shareholders to the corporate creditors. Accordingly, a receiver of an insolvent corporation, invested with 'all the estate, property, and equitable interests' of the concern, has no power to enforce such a liability as this. The action to enforce can be maintained only by the creditors themselves, in their own right and for their own benefit." The rule is stated to the same effect, and as positively, in 2 Beach on Private Corporations, sec. 716, 2 Morawetz on Private Corporations, sec. 869, 3 Thompson on Corporations, sec. 3560, Taylor on Private Corporations, sec. 721, and Thompson's Liability of Stockholders, sec. 342. There are also many cases to the same effect, of which we will mention *Runner v. Dwiggins*, 147 Ind. 238; *Minneapolis Base Ball Co. v. City Bank*, 66 Minn. 441; *Jacobson v. Allen*, 12 Fed. Rep. 454; *Wright v. McCormack*, 17 Ohio St. 86; *Liberty Female College Assn. v. Watkins*, 70 Mo. 13; *Farnsworth v. Wood*, 91 N. Y. 308; *Arenz v. Weir*, 89 Ill. 25; *Hanson v. Donkersley*, 37 Mich. 184; *Wincock v. Turpin*, 96 Ill. 135.

There are some to the contrary. That of *Cushing v. Perot*, 175 Pa. St. 66, 52 Am. St. Rep. 835, is one of those relied on by the appellants. The learned judge who delivered the opinion in that case thought that the weight of authority was with that decision, but we do not so find it, nor can we agree with the reasoning of that case, especially when considered in connection with our own decisions. The supreme court of Massachusetts in *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 70 Am. St. Rep. 232, expressly declined to follow it in construing the statute of Kansas before those courts: See, also, *Bell v. Farwell*, 176 Ill. 489, 68 Am. St. Rep. 194; *Western Nat. Bank v. Lawrence*, 117 Mich. 669, in reference to that statute. In *Wilson v. Book*, 13 Wash. 676, affirmed in *Watterson v. Masterson*, 15 Wash. 511, the liability of the stockholders was passed on under a constitutional provision of that state, the court holding that it constituted "a part of the receivers' trust fund which the court is authorized to direct them to enforce for the benefit of all the creditors." In *State v. Union Stock Yard etc.*, 103 Iowa, 549, the court conceded that the general rule is that money due under the statutory liability is not an asset of the bank, and that a receiver has no authority to collect it, but held that a receiver appointed by a decree under the

statute of Iowa could enforce it. In *Minnesota etc. Mfg. Co. v. Langdon*, 44 Minn. 37, the fund allowed to be recovered by the receiver was capital stock which had been unlawfully refunded to the stockholders as dividends, and of course that was an asset. The case of *Minneapolis Base Ball Co. v. City Bank*, 66 Minn. 441, points out the distinction.

Without prolonging this opinion by the citation of other cases, it seems clear to us that the great weight of authority denies the right of the receiver to sue for a liability created by a statute such as the one before us, and when he has ⁷¹⁹ been permitted to enforce such a claim, it has, almost without exception, been by reason of the peculiar provisions of the laws before the courts. The national bank act and statutes in some of the states expressly authorize suits to be so brought, but this one not only does not so provide, but, as we have seen, the liability is only to those creditors who became such while the party sought to be held was a stockholder. The fund arising from such liability is in no sense an asset of the corporation, and the receivers have no interest in it. The demurrer was therefore properly sustained and the judgment must be affirmed. As it appears that the appellants were authorized by the court to sue, we will direct the costs to be paid out of the estate.

Judgment affirmed, costs to be paid out of the fund in the hands of the receivers.

STATUTORY LIABILITY OF STOCKHOLDERS FOR DEBTS OF CORPORATION—ENFORCEMENT OF—RECEIVER.—A suit in equity by a creditor or creditors for the benefit of all the creditors is the proper remedy to enforce the liability of stockholders in an insolvent corporation for the debts thereof. Neither the assignee nor receiver of an insolvent corporation can maintain such suit unless given the right by statute: *Zang v. Wyant*, 25 Colo. 551, 71 Am. St. Rep. 145.

**BAKER v. SAFE DEPOSIT AND TRUST COMPANY OF
BALTIMORE.**

[90 Maryland, 744.]

PARTNERSHIP—LOSS OF CAPITAL—CONTRIBUTION.—Whatever may be the legal liability of partners to outside persons, as among themselves a disproportionate interest as to profits and losses may be agreed on. Hence, if one partner supplies all the capital of the firm, and the others furnish their time, services, and skill, under an agreement that they shall be entitled only to a share of the profits after payment of debts, but with no understanding among the parties that losses shall be made good by the joint contribution of all the partners, any impairment of the capital must, upon liquidation of the business, be borne alone by the partner who supplied it.

PARTNERSHIP LIABILITIES—ACCORD AND SATISFACTION OF—WHAT IS NOT.—In a controversy between the executor of a deceased partner and the surviving partners, the executor claiming that they are answerable for certain losses or debts of the firm, which liability they deny, an agreement, though approved by the court, whereby the surviving partners convey to the executor their interest in certain firm property, does not operate as an accord and satisfaction of the partnership liabilities, where it is explicitly stated therein that the agreement shall not be conclusive upon the question as to whether the surviving partners are personally answerable for the liabilities of the firm.

PARTNERSHIP—LOSS OF CAPITAL—CONTRIBUTION—WHEN NOT ENFORCEABLE.—If a father forms a partnership with his sons, he alone supplying the capital, and they furnishing their services, and, upon the father's death and dissolution of the firm, there is a loss of capital after all debts are paid by the executor, the latter cannot, upon a bill filed by him against the surviving partners for contribution, compel them to contribute toward such loss, where it appears from the evidence, there being no written articles of partnership, that the sons were never credited with any interest in the firm property, but only with a percentage of net profits; and that all firm debts were payable, primarily, from profits, and, if these were not adequate, then out of the capital; for this clearly shows that it was not intended for the sons to contribute toward a loss of capital.

George Whitelock and Charles Marshall, for the appellants.

John J. Donaldson and George R. Willis, for the appellee.

⁷⁵⁰ **PEARCE, J.** This is a bill filed in the circuit court for Baltimore City by the appellee, as executor of Charles J. Baker, deceased, against the appellants, two of his sons, as surviving partners of the firm of Baker Brothers & Co., for an accounting, and for contribution by them to the losses of ⁷⁵¹ the firm in proportion to their respective interests therein. The answer to the bill, while admitting the partnership charged, set up two defenses to the relief prayed: 1. That the appellants

never were liable, as between themselves and their deceased partner, for any of the losses or debts of the firm; and 2. That if they ever were so liable, such liability was fully discharged by certain proceedings had for that purpose, under the authority of the orphans' court for Baltimore county, having jurisdiction of the settlement of the estate of their deceased partner, and constituting a full accord and satisfaction of the claim of the appellee for an accounting and contribution.

It was established by the testimony that the whole of the capital of the firm was supplied by the deceased partner, and that the appellants were never required to supply any capital, but that the profits were divided between them, whenever profits were earned, in proportions varying from time to time; that all the debts of the firm had been fully paid by the appellee as executor of the deceased partner, and that upon payment of all said debts there was a loss of capital of one hundred and thirty-six thousand four hundred dollars, of which one hundred and thirteen thousand four hundred dollars was caused by depreciation of real estate below the figures at which it was carried on the books. It is seen, therefore, that only the rights of the partners inter sese are concerned in this inquiry, and we shall consider first the second defense presented.

We must agree with the judge of the circuit court that the proceedings in the orphans' court of Baltimore county, by which the appellants bought certain assets and conveyed other partnership property for the uses of the will of Charles J. Baker, did not operate as an accord and satisfaction of the partnership liabilities, though it is by no means clear what was the full consideration to the appellants for the conveyances by them of their interest in the real and leasehold property theretofore belonging to the firm, and the assignment of their interest in all assets of the firm, other than those purchased by them. On the 9th of December, 1895, ⁷⁵² all the parties entered into a written agreement to submit to Mr. Charles C. Homer and to Mr. John T. Mason, R., as arbitrators, certain questions relating to the settlement of the affairs of the firm, among which was the question of the liability of the appellants to contribute to any loss of capital. But this arbitration, for some unexplained reason, was abandoned.

On January 4, 1896, the appellants submitted their written proposition for the purchase and conveyances mentioned above, but they did not make a condition of its acceptance that they should be released from liability for losses. They merely de-

clared they did not admit such liability. On receipt of that proposition, the appellee, on January 5, 1896, filed a petition in the orphans' court, reciting the proposition; stating its belief that it was for the interest of the estate it should be accepted as the only alternative to a disastrous receivership, but expressly denying the suggestion of the appellants that the appellee was solely liable for the debts of the firm, while admitting it was liable to the creditors, on demand. On January 8, 1896, the orphans' court authorized the acceptance of the proposition, and the payment by the appellee of all claims for which the estate was liable, when properly authenticated; and on January 21, 1896, the appellants executed a conveyance and an assignment consummating the transaction, and an agreement of even date setting forth all the details of the transaction, concluding with this clause: "It is also understood by said executor, and by said William, Jr., and Charles E. Baker, that the question as to whether or not the said William, Jr., and Charles E. are personally liable for the liabilities of the firm is not concluded hereby." Whatever conclusive effect might otherwise be attributed to this not altogether clear transaction, we cannot say that it concluded a question which the parties themselves, in their solemn agreement carrying out the accepted proposition, have said was not concluded.

We come then to the defense first presented—that the ⁷⁵³ appellants never were liable, as between themselves and their deceased partner, for any of the losses of the firm. This partnership was formed September 1, 1865, when Charles J. Baker purchased the interest of Henry J. Baker and Joseph Rogers, Jr., in the firm of Baker Brothers & Co., and gave notice by publication that he had associated with him his two sons, William Baker, Jr., and Charles E. Baker under the old firm name. Charles J. Baker died September 22, 1894, but the firm was continued under the provisions of his will until January 21, 1896, when it was dissolved by mutual consent. There can be no question that the effect of Charles J. Baker's publication, made with the knowledge of the appellants, had the effect to bind them equally with him, as to third parties, in all firm transactions; but it does not follow, merely because they were so bound to third parties, that they were also bound to share all losses of the firm. Mr. Lindley, in speaking of the right of contribution (2 Lindley on Partnership, 1st Am. from 4th Eng. ed., *754), says: "It cannot exist if excluded by agreement, and it is so excluded whenever those who would otherwise be

contributaries have entered into any contract, express or tacit, amongst themselves, which is inconsistent with a right on the part of one to demand contribution from the others. This is too obvious to require comment, but it must be borne in mind as qualifying the common saying that the right to contribution is independent of agreement": 2 Lindley on Partnership, 1st Am. from 4th Eng. ed., *781.

In *Welsh v. Canfield*, 60 Md. 473, this court said: "Whilst, in general, a partnership imports community of profits and losses among its several members, it cannot be doubted that whatever may be their legal liability to outside parties, as among themselves a disproportionate interest as to profits and losses may be agreed on." It is very plain upon principle that a deficiency of capital upon liquidation must be considered as any other loss, according to the terms of the agreement, and hence Mr. Lindley, in treating of this subject (2 Lindley on Partnership, 1st Am. from 4th Eng. ed., *808), says: "The only case which practically gives rise to difficulty is when partners ⁷⁵⁴ have advanced or agreed to advance unequal capitals, and to share profits and losses equally. If nothing more than this is agreed, a deficiency of capital must be treated like any other loss; . . . but if the meaning of the partners is that all debts shall be paid out of the assets, and that any surplus assets remaining after payment of debts shall be divided between the partners in proportion to their interests therein, or to their capitals, effect must be given to such agreement, and those partners who bring in most capital must lose most." A necessary corollary to this reasoning would seem to be that where one supplied all the capital, under an agreement restricting the partnership to profits, when earned, and only after payment of all debts, that if on liquidation there was an impairment of capital, he who provided it must bear the whole loss. Here the only right growing out of the partnership relation, which is asserted in the bill, or which is involved in its consideration, is the right to require the appellants to contribute out of their own pockets to reimburse the executor of their deceased father and partner for impairment of his capital and the payment of firm debts out of the father's estate. Our inquiry, therefore, must be, What were the terms of their agreement of partnership in this regard? There being no written articles of agreement, and the death of Charles J. Baker preventing recourse to the evidence of any of the parties themselves upon this point, we are confined to the course of dealing between the parties as shown

by the partnership books and transactions, supplemented by the other competent testimony introduced to explain the course of dealing from which the judge of the circuit court states in his opinion he found nothing that would vary the general rule of partnership liability.

Now, it is admitted that Charles J. Baker always supplied all the capital of the firm, and that the sons never did supply, and were never required to supply, any. The books of the firm, confirmed by the testimony of Brauns, an expert accountant, and for over twenty years a bookkeeper ⁷⁵³ of the firm, and by that of Myer, also an expert accountant, after full examination, show that throughout the whole period from 1865 to 1894, the sons were never credited with any share or interest in the property or capital of the firm, and that they were never credited with anything more than a certain percentage of net profits, and that when there were no net profits, none of the partners received anything. The father received nothing for his capital and services, and the sons received nothing for their services, they having no capital. In this there was nothing unusual, it being settled that the capital of a firm may consist of the mere use of the property owned by one member of the firm. "In such case the title remains in the individual member during the continuance of the partnership, and upon its dissolution, the property is freed from such use": *Citizens' Fire Ins. Co. v. Doll*, 35 Md. 106, 6 Am. Rep. 360; *Whiting v. Leakin*, 66 Md. 265. The percentage of net profits which they received varied, but the rule restricting them to profits never varied. The percentage ranged from one-sixth to one-fourth for each of the sons, with the residue to the father. Whenever these distributions were made, the individual account of each member was credited with his percentage, and the profit and loss account was debited with the aggregate amount. At six of the semi-annual distribution periods of June and December in each year, there were no available profits, and no distribution was made. At every distribution period, all debts, expenses, and losses were charged to profit and loss, and if there was still an unsettled balance of loss, such balance was carried over and charged against the profits at the next distribution period. No loss was ever charged to the individual account of any partner until June 30, 1894, when the sum of twenty-three thousand dollars, amount of loss at that time, was charged to the account of Charles J. Baker by direction of Charles E. Baker. Conceding, as we must do, that this entry would not bind the ap-

pellee if not known to and approved by Charles J. Baker, provided it would operate to his prejudice, we are of opinion it ⁷⁵⁶ could not so operate, because, under the agreement as we construe it, all debts were payable in primarily from profits, and if these were not adequate, then by Charles J. Baker, so that ultimately these losses must have been paid by him. It was shown by Mr. Blacklock, a witness for the appellee, after examining the books, that the net profits distributed were what remained "after all charges and bad debts were taken out." This was the unbroken course of business between the partners. In accordance with this course of business, when certain real estate which was carried on the books at seventy thousand dollars, was appreciated in value to the extent of nineteen thousand dollars, this increase was in June, 1872, carried to profit and loss and distributed as part of the net profits. This was the correct disposition, because that distribution did not impair the capital of the father, which upon dissolution would remain in specie. This distribution was therefore no departure from the uniform course, and, even if it were, having been made under the direction of the father, the sons could no more be required to contribute to its return to the estate than they could be required to return a proportion of net profits distributed ten or twenty years before, to make good losses afterward occurring. Net profits, as defined above, have been shown to be the only source, under the dealings of the parties, to which the sons could look for compensation for their services, and the only source to which the father could look for reimbursement for debts of the firm paid by him. We cannot believe, in the face of the evidence afforded by the partnership books, that the father meant if losses were incurred greater than the profits would discharge that his sons were not only to lose their labor, but to go down into their pockets to share with him the loss of his capital. The question we have to decide is one of intention and must be determined by a consideration of all the circumstances available for the construction of the contract: *Parsons on Contracts*, 58; *Fleischmann v. Gottschalk*, 70 Md. 529. Our construction of the contract, as deduced from the uniform course of dealing between the ⁷⁵⁷ partners, is, that the father put his capital against the time and skill of his sons, believing that the profits alone, under the plan adopted, would discharge all the debts and protect his capital from impairment; the sons believing that the profits, after payment of all debts, would insure them reasonable compensation for their time and skill.

The principle involved in this view of the contract is supported by courts of acknowledged reputation, and by text-writers of authority. In *Everly v. Durborrow*, 8 Phila. 93, a bill was filed for an account between partners, where one contributed money, and the other time and skill, and the whole capital was lost, but the relief was denied by Judge Sharswood, who cited the following language from Lindley on Partnership: "Whatever at the commencement of the partnership is thrown into the common stock belongs to the firm, unless the contrary can be shown"; and then said what, he adds, does not contradict this: "At the expiration of this partnership, this capital shall be returned without interest before the final division of profits. But here there are no profits to be divided; there is no capital to return, Everly has lost his money, and Durborrow has lost what he set against it, his time and services enhanced in value by his knowledge of the business." This, it is true, was a *nisi prius* decision, but the great name of Judge Sharswood gives it just authority. The same view was held by the eminent Chief Justice Robertson, of Kentucky, in *Heran v. Hall*, 1 B. Mon. 159, 35 Am. Dec. 178, who said: "It is a general rule that when the capital of one party is money, and that of the other labor or other personal service, they are not partners *inter sese* in the technical sense, merely because they had no mutual interest in the profits, and that nothing else appearing, even considering them partners in the stock, he whose capital was labor would not be liable to him whose capital was money for contribution for any loss of capital in the adventure; for in such a case each will have sustained a correspondent loss of his capital; and neither of them would therefore be liable to the other for contribution."

⁷⁵⁸ In *Cameron v. Watson*, 10 Rich. Eq. 103, the same view was expressed by Chancellor Dunkin, quoting from Puffendorf: "In partnerships where, on the one side, labor is contributed, and on the other only the use of money, that partner who contributed the money does not always admit the other to a share of the principal, but only to a share of the profit which such labor and money joined together might produce. According to this rule, if there should be nothing gained by the partnership concern, A should lose his labor and B his interest, which would be equal and just. And should the original stock be diminished by the same rule, A loses only his labor, whereas B would lose interest and a part of his principal. At the dissolution B would be entitled to claim his money capital before any division of

profits. A could claim nothing as profits until the amount put in by B was returned. On the other hand, if it was not there, B, who had thus risked his property, must submit to the loss."

In *Manly v. Taylor*, 50 N. Y. Sup. Ct. 26, this opinion is said to be sustained by the weight of authority, and in *Hasbrouck v. Childs*, 3 Bosw. 105, the subject is discussed by Judge Murray Hoffman with great learning and fullness. After stating the general rule of equality, he says: "The case is very different when labor is furnished as an equivalent for the use of money only, and not as of equal value with the money itself. The contributor of capital has then a right to reclaim the amount from the fund. The contributor of labor is not liable for any part of a loss of such money. *Res perit domino*, is the maxim strictly applicable; and if any portion of the money is unexhausted, the party who advanced it receives it back." And in support of his statement he cites the passage from Puffendorf quoted in *Cameron v. Watson*, 10 Rich. Eq. 103, and says: "After a careful examination of the English authorities, I am satisfied that we are at liberty to adopt any just principle for the valuation of labor contributed to the partnership funds which the agreement of the parties does not preclude, and equity may dictate. ⁷⁵⁹ It is obvious that had the losses exhausted the whole capital Hasbrouck would in effect be made the guarantor of Child's capital in proportion to his interest in the profits—I apprehend that the agreement does not imply this, that the law does not warrant it, and certainly justice disclaims it."

The Pennsylvania, Kentucky, and South Carolina cases to which we have referred have been reviewed and disapproved in *Whitcomb v. Converse*, 119 Mass. 43, 20 Am. Rep. 311, but we are satisfied they state the sounder rule for the case before us.

We are confirmed in this conclusion by the language of the supreme court in *London Assur. Co. v. Drennen*, 116 U. S. 461, where the court said: "Persons cannot be made to assume the relation of partners as between themselves, when their purpose is no partnership shall exist. There is no reason why they may not enter into an agreement whereby one of them shall participate in the profits arising from the management of particular property without his becoming a partner with the others, or without his acquiring an interest in the property itself so as to effect a change of title." And also by what is said in *Paul v. Cullum*, 132 U. S. 550: "While in the absence of written stipulations or other evidence showing a different intention, part-

ners will be held to share equally both profits and losses, it is entirely competent for them to determine as between themselves the basis upon which profits shall be divided and losses borne, without regard to their respective contributions, whether of money, labor, or experience to the common stock."

We think the decree of the circuit court was erroneous.

Decree reversed and bill dismissed, with costs to appellants above and below.

PARTNERS INTER SESE—WHO ARE NOT —CONTRIBUTION FOR LOST CAPITAL.—In a joint adventure where one person furnishes money and another labor, they are not partners inter sese, in the technical sense, merely because they have a mutual interest in the profits; and he who contributes the labor is not liable to him who advances the money for any part of the capital lost in the venture: *Heran v. Hall*, 1 B. Mon. 150, 35 Am. Dec. 178. But see *Whitcomb v. Converse*, 119 Mass. 38, 20 Am. Rep. 311.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

LUNT v. COOK.

[175 Massachusetts, 1.]

MORTGAGE SALE—LEVY ON EQUITY OF REDEMPTION—PURCHASE AT FORECLOSURE BY MORTGAGOR.—Where a mortgagor's equity of redemption has been levied upon, a subsequent purchase of the property by him at foreclosure sale operates as a conveyance of the title to him, and not as a discharge or release of the mortgage, and hence a deed given by virtue of a subsequent sale of the equity of redemption which had been levied upon is of no effect.

Writ of entry to recover land. The property was originally conveyed by deeds to the defendant (tenant), the grantee being described as George Ward Cook, trustee. There were no other words to indicate a trust aside from this description. The tenant gave a mortgage of the premises to one Bowley on May 29, 1897, which contained a power of sale. February 19, 1898, all of the tenant's interest in the property was attached. April 22, 1898, demandant recovered judgment against the tenant, and on May 21, 1898, he levied execution on the tenant's equity of redemption. June 22, 1898, the mortgagee sold under the power of sale to the tenant, George Ward Cook, agent, and gave a deed. July 28, 1898, after prior attachments had been dissolved, the officer sold the tenant's equity of redemption previously levied upon. The tenant offered in evidence a certificate of an entry to foreclose the mortgage given by him to Bowley. The demandant requested the following rulings: 1. The deeds from Hall, guardian, and from Bowley and others to Cook, trustee, did not create an estate in trust; 2. Such deeds conveyed an absolute title to Cook; 3. The evidence does not es-

tablish a trust; 4. The deed from Bowley to Cook, agent, dated June 22, 1898, operated as a discharge of the mortgage given by Cook to Bowley; 5. The words "trustee" and "agent" in the deeds do not affect the construction of the deeds; 6. These words must be rejected as surplusage; 7. As matter of law, upon the evidence, the demandant is entitled to judgment; 8. The tenant is not entitled to judgment as matter of law. The judge made all the rulings, except the fourth, seventh, and eighth. Demandant excepted. Judgment for the tenant.

F. H. Pearl, for the demandant.

H. J. Cole, for the tenant.

³ MORTON, J. The effect of the levy was to divest the tenant of the equity of redemption: Capen v. Doty, 13 Allen, 262; Pub. Stats., c. 172, sec. 45; Stats. 1896, c. 464, sec. 1. All that remained to the tenant was the right to redeem from the levy: Pub. Stats., c. 172, sec. 32. This was taken away by the foreclosure proceedings, and the deed under the power of sale contained in the ⁴ mortgage operated as a conveyance of the title to the tenant, and not as a discharge or release of the mortgage. The doctrine of merger does not apply. The rulings which were requested and refused were rightly refused.

Judgment for the tenant.

EXECUTION SALES OF THE EQUITY OF REDEMPTION are discussed in the monographic note to Atkins v. Sawyer, 11 Am. Dec. 193-198.

BONNEY v. BONNEY.

[175 Massachusetts, 7.]

MARRIAGE AND DIVORCE—CRUEL TREATMENT.—The acts of a wife in failing to stay at home and take care of her sick husband, or in refusing to consent to his hiring a nurse so to do, and in neglecting to properly administer medicines to him, he being under the care of a physician and financially able to procure proper food and nursing, do not constitute such cruel and abusive treatment as will authorize a suit for divorce, though his health was temporarily injured thereby.

P. A. Aubertin and R. O. Harris, for the libelant.

No counsel appeared for the libelee.

⁷ LORING, J. We are of opinion that the acts of the libelee did not amount to cruel and abusive treatment within

the meaning ^s of the Public Statutes, chapter 146, section 1. The libelant testified: "There was nobody else in the family to administer medicines except my wife; she gave me medicines when she was there; she did not remain at home all the time; she went to the theater and dances; she was at work also. I was of financial ability to procure a servant. I endeavored to procure a nurse or housekeeper to wait upon me. I wanted to; she said if I did she would leave the place." Another witness for the libelant testified that the libelee "was off on her wheel sometimes; she could not do as she could if she stayed at home."

Without doubt the libelee failed to perform the duties of a wife in failing either to stay at home and take care of her husband, or to consent to her husband hiring a nurse or housekeeper so to do. But the libelant was not dependent solely upon his wife. He was under the care of a physician, and had the money with which to procure proper food and nursing. It appears that he did in fact procure the proper food when he got up from his sick bed, by boarding with the occupants of another tenement in the same house, and that he afterward went to Jamaica in search of health. If he was not content with the care his wife gave him while he was sick in bed, his remedy was to hire a nurse, even if his wife wrongly threatened to leave his tenement if he did so. There was no pretense that this could not have been done through the physician in attendance.

Under these circumstances the fact that the libelant's health was temporarily injured by the libelee's failure to comply with the doctor's orders as to the libelant's diet and medicines is not sufficient. Her action in that respect may in one sense be said to be cruel, and the libelant may be said to have been abused by her. But it is not such cruel and abusive treatment as under the circumstances of the libelant will cause injury to his health or create danger of such injury, or reasonable apprehension of such danger, if the parties continue to live together; and nothing less will make out a case of divorce on this ground: *Bailey v. Bailey*, 97 Mass. 373, 380, 381; *Lyster v. Lyster*, 111 Mass. 327-329.

Libel dismissed.

DIVORCE ON THE GROUND OF CRUELTY will be denied, if there is no actual bodily violence, unless the treatment or neglect is such as impairs the health, or renders cohabitation intolerable or unsafe: See the monographic note to *Reinhard v. Reinhard*, 65 Am. St. Rep. 78, on cruelty as a ground for divorce.

FROTHINGHAM v. SHAW.

[175 Massachusetts, 59.]

ESTATES OF DECEDENTS—COLLATERAL INHERITANCE TAX—PERSONAL PROPERTY—CONFLICT OF LAWS. Stocks and bonds of foreign corporations, including bonds secured by mortgage, situated in one state, but owned by a resident of another state, are for the purposes of taxation treated as having a situs at the domicile of their owner, and upon the death of such owner are subject to the payment of a collateral inheritance tax imposed by the law of the domicile.

ESTATES OF DECEDENTS—CONFLICT OF LAWS—SUCCESSION TAX.—Legacy and succession duties as such are payable at the place of domicile in respect to movable property wherever situated, since the succession or legacy takes effect by virtue of the law of the domicile.

EXECUTORS AND ADMINISTRATORS.—PAYMENT BY A FOREIGN DEBTOR TO THE DOMICILIARY ADMINISTRATOR will be a bar to a suit brought by an ancillary administrator subsequently appointed.

Petition by the executor of a will for instructions as to the payment of a collateral inheritance tax on residuary legacies.

G. R. Nutter and T. L. Frothingham, for the petitioners.

A. W. De Goosh, assistant attorney general, for the respondent.

⁶⁰ **MORTON, J.** At the time of his death the testator was domiciled at Salem, in this commonwealth, and his estate, except certain real estate situated here and appraised at two thousand one hundred dollars, and cash in a savings bank in Salem amounting to nine hundred and ninety-three dollars, was, and for many years had been, in the hands of his agents in New York, and consisted of bonds and stock of foreign corporations, a certificate of indebtedness of a foreign corporation, bonds secured by mortgage on real estate in New Hampshire, the makers living in New York, and of cash on deposit with a savings bank and with individuals in Brooklyn—the total being upward of forty thousand dollars.

There has been no administration in New York, and the petitioners have taken possession of all the property except the real estate, and have paid all of the debts and legacies except the residuary legacies. None of the legacies are entitled to exemption if otherwise liable to the tax.

The petitioners contend that the stocks, bonds, etc., were not “property within the jurisdiction of the commonwealth,”

within the meaning of the Statutes of 1891, chapter 425, section 1, and that, if they were, the succession took place by virtue of the law of New York and not of this state.

It is clear that if the question of the liability of the testator to be taxed in Salem for the property had arisen during his lifetime he would have been taxable for it under the Public Statutes, chapter 11, sections 4, 20, notwithstanding the certificates, etc., were in New York: *Kirtland v. Hotchkiss*, 100 U. S. 491; *State Tax on Foreign-Held Bonds*, 15 Wall. 300; *Cooley on Taxation*, 2d ed., 371; and the liability would have extended to and included the bonds secured by mortgage: *Kirtland v. Hotchkiss*, 100 U. S. 491; *State Tax on Foreign-Held Bonds*, 15 Wall. 300; *Hale v. County Commrs.*, 137 Mass. 111. It is true that the Public Statutes provide that personal property wherever situated, whether within or without ⁶¹ the commonwealth, shall be taxed to the owner in the place where he is an inhabitant. But it is obvious that the legislature cannot authorize the taxation of property over which it has no control, and the principle underlying the provision is that personal property follows the person of the owner, and properly may be regarded, therefore, for the purposes of taxation, as having a situs at his domicile, and as being taxable there. After the testator's death the property would have been taxable to his executors for three years, or until distributed and paid over to those entitled to it, and notice thereof to the assessors; showing that the fiction, if it is one, is continued for the purposes of taxation after the owner's death: *Pub. Stats.*, c. 11, sec. 20, cl. 7; *Hardy v. Yarmouth*, 6 Allen, 277. In the present case, the tax is not upon property as such, but upon the privilege of disposing of it by will, and of succeeding to it on the death of the testator or intestate, and it "has some of the characteristics of a duty on the administration of the estates of deceased persons": *Minot v. Winthrop*, 162 Mass. 113, 124; *Callahan v. Woodbridge*, 171 Mass. 595; *Greves v. Shaw*, 173 Mass. 205; *Moody v. Shaw*, 173 Mass. 375. In arriving at the amount of the tax, the property within the jurisdiction of the commonwealth is considered, and we see no reason for supposing that the legislature intended to depart from the principle heretofore adopted, which regards personal property for the purposes of taxation as having a situs at the domicile of its owner. This is the general rule: *Cooley on Taxation*, 2d ed., 372; and though it may and does lead to double taxation, that has not been accounted a sufficient objection to taxing personal prop-

erty to the owner during his life at the place of his domicile, and we do not see that it is a sufficient objection to the imposition of succession taxes or administration duties under like circumstances after his death.

In regard to the mortgage bonds, it is to be noted, in addition to what has been said, that this case differs from *Callahan v. Woodbridge*, 171 Mass. 595. In that case the testator's domicile was in New York, and it does not appear from the opinion that the note and mortgage deed were in this state. In this case the domicile was in this commonwealth, and we think that for the purposes of taxation the mortgage debt may be regarded as having a situs here. This is the view taken in *Hanson's Death Duties*, fourth edition, 239, 240, which is cited apparently with approval by Mr. Dicey, though he calls attention to cases which may tend in another direction: See *Dicey on Conflict of Laws*, 319, note 1.

It seems to us, therefore, that for the purposes of the tax in question the property in the hands of the executor must be regarded as having been within the jurisdiction of this commonwealth at the time of the testator's death: See *In re Swift*, 137 N. Y. 77; *Miller's Estate*, 182 Pa. St. 157.

The petitioners further contend that the succession took place by virtue of the law of New York. But it is settled that the succession to movable property is governed by the law of the owner's domicile at the time of his death. This, it has been often said, is the universal rule, and applies to movables wherever situated: *Stevens v. Gaylord*, 11 Mass. 256; *Dawes v. Head*, 3 Pick. 128, 144, 145; *Fay v. Haven*, 3 Met. 109; *Wilkins v. Ellett*, 9 Wall. 740; 108 U. S. 256; *Freke v. Carbery*, L. R. 16 Eq. 461; *Attorney General v. Campbell*, L. R. 5 H. L. 524; *Duncan v. Lawson*, L. R. 41 Ch. D. 394; *Sill v. Worswick*, 1 H. Black. 665, 690; *Dicey on Conflict of Laws*, 683; *Story on Conflict of Laws*, 7th ed., secs. 380, 481.

If there are movables in a foreign country, the law of the domicile is given an extraterritorial effect by the courts of that country, and in a just and proper sense the succession is said to take place by force of and to be governed by the law of the domicile. Accordingly, it has been held that legacy and succession duties as such were payable at the place of domicile in respect to movable property wherever situated, because in such cases the succession or legacy took effect by virtue of the law of domicile: *Wallace v. Attorney General*, L. R. 1. Ch. D. 1;

Dicey on Conflict of Laws, 785; Hanson's Death Duties, 423, 526.

With probate or estate or administration duties as such it is different. They are levied in respect of the control which every government has over the property actually situated within its jurisdiction, irrespective of the place of domicile: *Laidlay v. Lord Advocate*, L. R. 15 App. Cas. 468, 483; Hanson's Death Duties, 4th ed., 2, 63.

Of course, any state or country may impose a tax and give it such name or no name as it chooses, which shall embrace, if so ⁶³ intended, the various grounds upon which taxes are or may be levied in respect of the devolution of estates of deceased persons, and which shall be leviable according as the facts in each particular case warrant. In England, for instance, the estate duty, as it is termed, under the finance act of 1894 (57 & 58 Vict., c. 30) has largely superseded the probate duty, and under some circumstances takes the place of the legacy and succession duty also: Hanson's Death Duties, 4th ed., 62, 63, 81.

But whatever the form of the tax, the succession takes place and is governed by the law of the domicile; and, if the actual situs is in a foreign country, the courts of that country cannot annul the succession established by the law of the domicile: *Dammert v. Osborn*, 141 N. Y. 564. In further illustration of the extent to which the law of the domicile operates, it is to be noted that the domicile is regarded as the place of principal administration, and any other administration is ancillary to that granted there. Payment by a foreign debtor to the domiciliary administrator will be a bar to a suit brought by an ancillary administrator subsequently appointed: *Wilkins v. Ellett*, 9 Wall. 740; 108 U. S. 256; *Stevens v. Gaylord*, 11 Mass. 256; *Hutchins v. State Bank*, 12 Met. 421; *Martin v. Gage*, 147 Mass. 204. And the domiciliary administrator has sufficient standing in the courts of another state to appeal from a decree appointing an ancillary administrator: *Smith v. Sherman*, 4 Cush. 408. Moreover, it is to be observed, if that is material, that there has been no administration in New York, that the executor was appointed here, and has taken possession of the property by virtue of such appointment and must distribute it and account for it according to the decrees of the courts of this commonwealth. To say, therefore, that the succession has taken place by virtue of the law of New York would be no less a fiction than the petitioners insist that the maxim, *Mobilia sequuntur personam*, is when applied to matters of taxation.

The petitioners contend that in *Callahan v. Woodbridge*, 171 Mass. 595, it was held that the succession to the personal property in this state took place by virtue of the law of this state, although the testator was domiciled in New York. We do not so understand that case. That case and *Greves v. Shaw*, 173 Mass. 205, and *Moody v. Shaw*, 173 Mass. 375, rest on the right of a state to impose a tax or duty in ⁶⁴ respect to the passing on the death of a nonresident of personal property belonging to him and situated within its jurisdiction. We think that the decree should be affirmed.

So ordered.

TAXATION.—ON THE SITUS OF STOCKS AND BONDS for purposes of taxation, see the monographic note to *Buck v. Miller*, 62 Am. St. Rep. 452-459.

COLLATERAL INHERITANCE TAX—SITUS OF PROPERTY. Personal property of a resident decedent, whether situated within or without the state, is subject to the collateral inheritance tax law; and the estate of a decedent composed of bonds or securities, no matter where deposited, is subject to such law in the state of his domicile at the time of his death: Monographic note to *State v. Hamlin*, 41 Am. St. Rep. 583. See, too, the extended note to *Buck v. Miller*, 62 Am. St. Rep. 454, 455.

HARDY v. BEVERLY SAVINGS BANK.

[175 Massachusetts, 112.]

ATTACHMENT—MORTGAGE SALE—SURPLUS.—Where a creditor of a mortgagor, who has attached his equity of redemption, wishes to protect any interest that he may have in the proceeds remaining in the mortgagee's hands upon a foreclosure sale, he should give due notice to the mortgagee, and the mortgagee is not liable to him for the proceeds after a foreclosure sale, where, without notice of such creditor's claim, he pays the surplus to the mortgagor.

Bill in equity alleging that one Forrest executed to the defendant a mortgage containing a power of sale, conditioned to pay two thousand one hundred dollars. The property was sold under the power of sale for two thousand five hundred and seventy-one dollars, which exceeded the indebtedness by two hundred and nineteen dollars and twenty-seven cents. Subsequently to the execution of the mortgage, but before the sale, the plaintiff attached Forrest's interest in the mortgaged real property and the attachment was recorded. The plaintiff recovered judgment against Forrest for two hundred and fifteen

dollars. Within thirty days from the date of the judgment, the plaintiff had maintained his lien on the surplus proceeds of the sale of the land by filing this bill and by demanding of defendant Forrest's share of such surplus. The answer alleged that the defendant, without notice of any legal proceedings by the plaintiff against Forrest, and upon the latter's order, paid two hundred dollars of the surplus to one Holcombe, an execution creditor of Forrest, of whose claim it had notice before the sale, and paid the balance to Forrest.

F. E. Barnard, for the plaintiff.

D. W. Quill, for the defendant.

113 MORTON, J. We think that this case is governed by *George v. Wood*, 9 Allen, 80, 85 Am. Dec. 741. In that case it was held that a mortgagee who had released a portion of the mortgaged premises was not bound to contribute to a subsequent mortgagee of the existence of whose mortgage he had no notice, actual or constructive, at the time of such release. It was further held that the fact that such subsequent mortgage had been duly recorded was not constructive notice to him: See, also, *Bates v. Norcross*, **114** 14 Pick. 224; *Western Union Tel. Co. v. Caldwell*, 141 Mass. 489. In the opinion in *George v. Wood*, 9 Allen, 80, 84, 85 Am. Dec. 741, it is said that when a purchaser from the mortgagor seeks to enforce his equity against a mortgagee who has released a portion of the mortgaged premises prior to the conveyance to such purchaser, "it is reasonable to require strict proof of notice. He [the purchaser] takes his title with full knowledge that it is subject to the mortgage; and if he does not perfect it by a release, he ought not to subject the mortgagee to the constant necessity of investigating transactions between the mortgagor and third persons subsequent to the mortgage, in order to protect him, when by giving notice he can so easily protect himself. The establishing of such mere collateral equities, which do not affect the legal title, cannot be considered as within the purposes intended to be accomplished by the statutes for registration of deeds." We think that this reasoning applies to the case of an attachment of an equity of redemption, and that, if the attaching creditor wishes to protect any interest that he may have in the proceeds remaining in the mortgagee's hands upon a foreclosure sale he should give due notice to the mortgagee. Upon a foreclosure sale the attachment is not transferred

by operation of law to the funds in the hands of the mortgagee. It is only by due proceedings in equity that the creditor can secure the benefit of his attachment if there should be a surplus remaining in the mortgagee's hands upon the foreclosure sale. And we think that, as said in *George v. Wood*, 9 Allen, 80, 85 Am. Dec. 741, he can easily protect himself by giving notice to the mortgagee, and that it is more reasonable to require him to do so than it is to compel the mortgagee at his peril to keep run of all attachments and conveyances subsequent to his mortgage: See *Jones on Mortgages*, sec. 1930; *Fisher on Mortgages*, sec. 846; *Robbins on Mortgages*, 914; *Thorne v. Heard*, [1895] App. Cas. 495; *M'Lean v. Lafayette Bank*, 4 McLean, 430.

We see no difference in principle between the case of a release of a portion of the mortgaged premises by the mortgagee and the case of payment of the surplus remaining on a foreclosure sale.

Decree affirmed; bill dismissed.

MORTGAGEE—NOTICE TO, OF PURCHASER'S CLAIM.—A mortgagee having no notice of the alienation of a part of the mortgaged land does not lose his lien thereon by releasing another part of it: *Gulon v. Knapp*, 6 Paige, 35, 29 Am. Dec. 741. When the purchaser seeks to enforce his equity against the mortgagee, it is reasonable to require strict proof of notice: *George v. Wood*, 9 Allen, 80, 85 Am. Dec. 741.

PEOPLE'S SAVINGS BANK v. HEATH.

[175 Massachusetts, 131.]

RES JUDICATA—RECOVERY OF MONEY PAID ON JUDGMENT.—A bank, which pays its money to satisfy a judgment obtained against it by mistake as trustee of the principal defendant in a court of competent jurisdiction, in a suit in which the bank was duly served with process, and appeared and voluntarily took such action as made the judgment a necessary result of the proceedings, cannot recover such money, so long as the judgment remains unreversed.

RES JUDICATA—SUBMISSION ON AGREED FACTS.—The fact that a case is submitted on agreed facts, so that all objections to the form of action are waived cannot authorize a court to disregard the effect of a former unreversed judgment.

Contract, to recover money paid by the plaintiff upon a judgment against it. The bank was summoned as trustee in an action in favor of Heath against Adolph Johnson, and filed an

answer admitting its indebtedness to Johnson on a deposit of one hundred and five dollars and sixty-five cents. The bank supposed its depositor and the defendant were the same person, and upon judgment being obtained paid the one hundred and five dollars and sixty-five cents to satisfy the execution levied upon it. After payment the bank discovered its mistake of fact, that the defendant and its depositor were different persons, and that it had not been indebted to the defendant in the action.

F. J. Barnard, for the plaintiff.

A. S. Pinkerton, for the defendant.

¹⁸² BARKER, J. The savings bank paid its money to the present defendant to satisfy a judgment which he had obtained against the bank as trustee of the principal defendant in a court of competent jurisdiction, in a suit in which the bank was duly served with process, and appeared and voluntarily took such action as made the judgment a necessary result of the proceedings, and the judgment remains unreversed. Although it was obtained ¹⁸³ when the bank was not in fact indebted to the principal defendant, and because the bank made its answer as trustee and submitted to be charged under the mistake of falsely supposing itself indebted to the principal defendant, the judgment, until reversed, was a valid obligation due from the bank. Therefore it was no legal injury for the judgment creditor to take the bank's property in satisfaction of the judgment, although it would not have been entered but for the mistake: *Engstrom v. Sherburne*, 137 Mass. 153. The mistake was not the direct cause of the payment of the money. The payment was made because the bank wished and intended to discharge a valid judgment obligation against itself. The mistake was some steps farther back, and while it would have been good ground for some seasonable and appropriate action to reverse the judgment, it does not give the bank the right to recover the money which it has paid to satisfy a valid judgment still unreversed: *Homer v. Fish*, 1 Pick. 435, 11 Am. Dec. 218; *M'Rae v. Mattoon*, 13 Pick. 53; *Wilbur v. Sproat*, 2 Gray, 431. .

That the present case was submitted on agreed facts, so that all objections to the form of action are waived, could not authorize the court to disregard the effect of the former judgment. A submission upon facts agreed is not a substitute for

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proper proceedings seasonably brought to reverse a judgment, and the decision of a question so raised must be upon the theory that the judgment is in force.

Judgment for the defendant affirmed.

RES JUDICATA.—For instances of *res judicata*, see the monographic notes to *Gayer v. Parker*, 8 Am. St. Rep. 229-231; *Gould v. Sternburg*, 15 Am. St. Rep. 142-144; *Fahey v. Esterley Machine Co.*, 44 Am. St. Rep. 562-572. A judgment is conclusive as to the parties to it unless mistake or fraud is shown, *Keighler v. Savage Mfg. Co.*, 12 Md. 383, 71 Am. Dec. 600. But a mistake in a former decree is not conclusive where the point to which the mistake referred was not in litigation: *Garret v. Day*, 2 McCord Eq. 27, 16 Am. Dec. 629. And acquiescence in a judgment constitutes what is decided thereby *res judicata*, *Slocomb v. De Lizardi*, 21 La. Ann. 855, 99 Am. Dec. 740.

COMMONWEALTH v. NUTTING.

[175 Massachusetts, 154.]

CONSTITUTIONAL LAW—PROHIBITING FOREIGN INSURANCE.—THE LEGISLATURE has power to prohibit foreign insurance companies, their agents or brokers, from soliciting business within a state, even though the insurance contract makes the solicitors the agents of the insured in the transaction.

Indictment, under the Statutes of 1894, chapter 522, sections 87, 98, for negotiating and transacting unlawful insurance with a foreign insurance company not admitted to do business in the commonwealth.

E. Cowen, E. P. Carver, and E. E. Blodgett, for the defendant.

M. J. Sughrue, first assistant district attorney, for the commonwealth.

¹⁵⁴ **HOLMES, C. J.** The defendant is indicted for acting in the negotiation and transaction of unlawful insurance by negotiating ¹⁵⁵ in Boston with foreign insurers not admitted to do insurance business in this commonwealth, and procuring a policy of insurance upon a vessel in Boston, to be issued by them. The agreed facts sustain the indictment subject to certain questions which are brought before us by exceptions to a ruling that the facts warranted the jury in finding the defendant guilty, and to the refusal of several requests which need not be mentioned in detail.

The foundation of the defendant's argument is the decision in *Allgeyer v. Louisiana*, 165 U. S. 578. That was a proceeding by the state to recover a penalty for violating a state law intended to prevent dealing with any marine insurance company that had not complied with the law. The defendants were the parties insured. The policy, an open one, was issued outside the state, and the only act done within the state was the mailing of a letter describing certain cotton to which the defendants desired the policy to attach. But the court intimate somewhat broadly that a state legislature cannot make it unlawful for a man to make a contract of insurance outside the state, although he resides and is present in the state at the time when the contract is made. It now is contended that, if this is so, it cannot be unlawful for another man to obey a request to get such insurance, if made by the one who wants it, and that the contract in the present case was made outside the commonwealth, on principles which cannot be affected by the Statutes of 1894, chapter 522, section 3. It might be argued further that at the least this was not unlawful insurance, and so that this particular indictment fails, whether the defendant had done a punishable act or not.

We bow to the decision, and even to the intimations of the case cited, without criticism. But that case expressly leaves intact the settled power of the state to impose such conditions as it pleases upon the doing of any business by foreign insurance companies within its borders. Although the reasoning of many of the cases turns on the fact that such companies are corporations, we apprehend that the power is not dependent upon that fact, but is an unsundered portion of the state's general right to legislate: See *Allgeyer v. Louisiana*, 165 U. S. 591; *Leavenworth v. Booth*, 15 Kan. 627, 634. One main object in imposing such conditions in this commonwealth is to secure people against fraudulent ¹⁵⁶ or worthless contracts, and, in case of litigation, to save them from having to go abroad: See *Lamb v. Lamb*, 6 Biss. 420, 422. We assume, until it is decided otherwise, that the power to enforce these objects will be regarded as too important and substantial to be defeated by a device, even though the device, apart from its purpose, would only embody a common-law right. We are of opinion, therefore, that notwithstanding the right of McKie, if so minded, to apply from Boston to the London Lloyds for insurance, the legislature has power to prohibit the agents of the Lloyds, as well as the Lloyds themselves, from soliciting business in Bos-

ton, and to make that prohibition effectual by providing that it shall not be escaped by an agreement making the solicitors the agents of the insured in the transaction. In other words, while the legislature cannot impair the freedom of McKie to elect with whom he will contract, it can prevent the foreign insurers from sheltering themselves under his freedom in order to solicit contracts which otherwise he would not have thought of making. It may prohibit not only agents of the insurers, but also brokers, from soliciting or intermeddling in such insurance, and for the same reasons. What we have said goes very little, if any, further than what is laid down in similar terms in *Hooper v. California*, 155 U. S. 648, 657, 658, and the authority of that case is saved in terms in *Allgeyer v. Louisiana*, 165 U. S. 578, and is recognized again in *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 566. See, further, *Pierce v. People*, 106 Ill. 11, 46 Am. Rep. 683.

What the legislature can do it has done by the Statutes of 1894, chapter 522. By section 3, "it shall be unlawful for any person as insurance agent or insurance broker to make, negotiate, solicit, or in any manner aid in the transaction of" insurance upon any property or interests in this commonwealth or with any resident thereof, except as authorized by the act. By section 98, "any person who shall act in any manner in the negotiation or transaction of unlawful insurance with a foreign insurance company not admitted to do business in this commonwealth, or who as principal or agent shall violate any provision of this act in regard to the negotiation or effecting of contracts of insurance," is subjected to a penalty.

Whether the description of the insurance in the indictment as unlawful be rejected as surplusage, or whether the insurance be ¹⁵⁷ held to be unlawful within the meaning of the act and indictment because transacted through a broker acting unlawfully, an offense under the statute is set forth and the defendant properly was convicted. It is unnecessary to consider whether the same result could be reached in another way. Possibly, for the reasons given above, it would be within the power of the legislature to enact that the insurance broker should be regarded as the agent of the insurers, whatever the agreement of the parties, and in that way reach the result that any contract made through him when he and the insured were here would be made in this state and thus would be subject to our laws. Possibly it might be argued that such was the effect

of our statute, although, if so, it fails to state it as clearly as could be wished: See *Stata*. 1894, c. 522, secs. 3, end, 87, 90.

Exceptions overruled.

FOREIGN INSURANCE COMPANIES.—A STATE HAS POWER wholly to exclude foreign insurance companies from doing business within it: *Daggs v. Orient Ins. Co.*, 136 Mo. 382, 58 Am. St. Rep. 638. It is competent for the legislature to provide a penalty against any agent of a foreign insurance company who shall act without authority of the state, although the contract is made out of the state, and provides that he shall be deemed the agent of the insured: *Pierce v. People*, 106 Ill. 11, 46 Am. Rep. 683.

WETHERBEE v. PARTRIDGE.

[175 Massachusetts, 185.]

BLASTING — LIABILITY FOR — INDEPENDENT CONTRACTOR.—A defendant is liable for an injury to the plaintiff's property by the blasting of rocks upon the adjoining land of the defendant, and it is no defense that the work was in the hands of an independent contractor, where blasting was contemplated by the contract, and its performance was certain to cause the injury complained of unless it was guarded against.

J. P. Leahy and J. C. Pelletier, for the defendant.

G. H. Mellen, for the plaintiffs.

HOLMES, C. J. This is an action of tort to recover damages for an injury to the plaintiffs' property by the blasting of rocks upon adjoining land of the defendant. The defense relied on is that the work was in the hands of an independent contractor, and the question raised by the exceptions is whether that fact entitled the defendant to have a verdict directed in his favor. It may be assumed that the contract contemplated that blasting would be done, and the place where it was done was within three or four feet of the line between the plaintiffs and the defendant, and about eight or nine feet from the plaintiffs' house. Under such circumstances, it was plain that the performance of the contract would bring to pass the wrongful consequences of which the plaintiffs complain, unless it was guarded against, and if the principle recognized in *Woodman v. Metropolitan R. R. Co.*, 149 Mass. 335, 340, 14 Am. St. Rep. 427, applies, the defendant was bound to see that due care was used to prevent harm.

We are of opinion that the principle does apply. In some cases of blasting under an independent contract, we might go no further than to hold that there was a question for the jury whether the danger was so great as to make the defendant liable. But in the case at bar the danger was so obvious that only one conclusion was possible, and the defendant did not ask to go to the jury upon this point. What he wanted was to have a verdict directed in his favor. Cases sustaining the conclusion to which we have come are *Joliet v. Harwood*, 86 Ill. 110, 29 Am. Rep. 17; *James v. McMinimy*, 93 Ky. 471, 40 Am. St. Rep. 200; *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495. There are some other cases in which the subject has been approached solely from the point of view of master and servant, although not without dissent. These decisions we are ¹⁸⁷ not prepared to follow: *McCafferty v. Spuyten Duyvil etc. R. R. Co.*, 61 N. Y. 178, 185, 19 Am. Rep. 267; *Tibbetts v. Knox etc. R. R. Co.*, 62 Me. 437; *Edmundson v. Pittsburgh etc. R. R. Co.*, 111 Pa. St. 316. Compare *Stone v. Cheshire R. R. Co.*, 19 N. H. 427, 51 Am. Dec. 192; *Wright v. Holbrook*, 52 N. H. 120, 126, 13 Am. Rep. 12.

Exceptions overruled.

BLASTING—LIABILITY FOR—INDEPENDENT CONTRACTOR.—In the event of injury to a third person by negligent blasting by a contractor on the premises of the contractee, the contractee is liable: See the monographic note to *Covington etc. Bridge Co. v. Steinbrock*, 76 Am. St. Rep. 421. Compare *Berg v. Parsons*, 156 N. Y. 109, 66 Am. St. Rep. 542.

O'BRIEN v. MURPHY.

[175 Massachusetts, 253.]

OFFICIAL BONDS — CONTINUING LIABILITY.—Where there is a recital in a bond specifying the time during which the prescribed duty is to be performed by the principal, and the words of the condition are general and indefinite as to the time for which the surety is to be liable, such general words will be construed as limited by the recital, and the surety will be held liable only for the time therein specified.

OFFICIAL BONDS—CONSTRUCTION—CONTINUING LIABILITY.—The bond of a treasurer, whose office is held by annual election, the bond being given while he was holding office under his first election, does not become a continuing bond by inserting a provision that such treasurer shall perform his duties during the term for which he has been elected, "and during such further time as he

may continue to hold said office and until he shall deliver all the property which he may receive as such treasurer to his successor in office," such phrase merely applies to such further time beyond the term of one year as the principal might hold office by virtue of his first election, and it was not intended to cover the time under which he might hold office under any subsequent election.

H. I. Bartlett, for the plaintiffs.

A. W. Reddy and G. W. Cate, for the defendants.

²⁵⁴ HAMMOND, J. In the superior court the ruling was that the bond was not a continuing bond, and the demurrer was sustained on that ground; and the only question argued before us is whether this ruling was correct. In view of the conclusion to which we have come, we have not found it necessary to consider the other grounds of the demurrer.

The general rule is, that where there is a recital in the bond specifying the time during which the prescribed duty is to be performed by the principal, and the words of the condition are general and indefinite as to the time for which the surety is to be liable, such general words will be construed as limited by the recital, and the surety will be held liable only for the time therein specified. It is fair to presume that the parties had in contemplation only a liability for the time specified in the recital: *Brandt on Suretyship*, sec. 166; *Arlington v. Merricke*, 2 Saund. 403; *Liverpool Waterworks v. Atkinson*, 6 East, 507. In the latter case, the bond, after reciting that the defendant had agreed with the plaintiff to collect its revenues "from time to time for twelve months," contained the condition for the faithful performance of the principal "from time to time and at all times thereafter during the continuance of such his employment," and that "so long as he should continue and be employed by the company from time to time observe and perform the orders of their committee as far as the same should concern his said employment." ²⁵⁵ The general language was held to apply only to the twelve months.

The same rule is applied where the office or employment is by law or usage limited to a certain time, even if that fact be not recited in the bond: *Bigelow v. Bridge*, 8 Mass. 275; *Dedham Bank v. Chickering*, 3 Pick. 335; *Amherst Bank v. Root*, 2 Met. 522; *Chelmsford Co. v. Demarest*, 7 Gray, 1. In this last case the sureties on the bond of the treasurer of a manufacturing corporation, who under the statute was to be "chosen annually" and hold his office "until another is chosen and qualified in his stead," were bound only for the year for which he was

chosen and for such further time as was reasonably sufficient for the election and qualification of his successor and no longer, although the corporation failed to elect at their next annual meeting, notwithstanding that the condition of the bond stipulated for faithful performance of the principal "during his continuance in said office." Shaw, C. J., in giving the opinion, says: "Perhaps a bond might be framed, reciting that whereas the principal has been elected to the annual office of treasurer, and conditioned for his faithful performance of his duties for that term, and for such further time as he might continue to hold the same by annual re-election—such contract being clear and explicit as to the intent, and made by parties competent to bind themselves—and they remain bound, not because the office was not annual, but because they had anticipated future elections, and provisionally bound themselves accordingly. But the authorities are uniform that, when the office is annual, the parties to the bond are presumed, by law, to bind themselves accordingly, if there are no words inserted in the bond, clearly extending it to a future election: *Hassell v. Long*, 2 Maule & S. 363."

And even when there is language in the condition carrying the liability beyond the time for which the principal is elected, it is construed with considerable strictness, and the sureties are held only for such time as is plainly and explicitly therein specified. The leading principle is that the principal is not to be held beyond the precise terms of his contract. Thus, in *Middlesex Mfg. Co. v. Lawrence*, 1 Allen, 339, the sureties on a bond of the treasurer of a company, conditioned for the faithful ²⁵⁶ discharge of his duties "during the term for which he has been elected, and for and during such further time as he may continue therein by any re-election or otherwise," were held not liable for defaults occurring in years when, after being out of the office for a short time, he was again elected: See, also, *Lexington etc. R. R. Co. v. Elwell*, 8 Allen, 371; *Richardson School Fund v. Dean*, 130 Mass. 242.

In the present case, the bond, after reciting that the defendant Murphy has been chosen by the association as treasurer, and "by reason whereof and as such treasurer he will receive into his hands and possession divers sums of money, goods, and chattels and other things, the property of said association, and is bound to keep true and accurate accounts of all moneys and sums of money now in his hands and all which he shall receive by virtue of his office as treasurer aforesaid," proceeds as

follows: "Now, therefore, if the said Cornelius Murphy shall well and truly perform all and singular the duties of treasurer of said association for and during the term for which he has been elected and during such further time as he may continue to hold said office, and until he shall deliver all the property which he may receive as such treasurer to his successor in office, or to such other person or persons as said association or its authorized officers may direct according to the provisions of the constitution, by-law, rules, and regulations of said association now existing or which may be by said association adopted, then this obligation shall be void; otherwise to be and remain in full force."

It appears by the declaration that the election was for one year, and it was conceded at the argument before us that by the by-laws of this association the office of treasurer was an annual office. Murphy, therefore, held his office by annual election. At the time the bond was given, he was holding office under his first election. If it was the intention of the parties that the sureties were to be held during the whole time that he should continue to hold his office by annual elections or otherwise, there was no difficulty in plainly expressing that intent. We do not think that intent is plainly expressed in the phrase "during such further time as he may continue to hold said office and until he shall deliver all the property which he may receive as such treasurer to his successor in office." Although the election was ²⁵⁷ for only one year, yet it might reasonably be anticipated that there sometimes would be considerable delay in the election and qualification of a successor, either by reason of the failure of the organization to effect an election, or the failure of the person elected to qualify, or from some other cause.

Applying the well-settled rules of interpretation applicable to such contracts, we think that the phrase, "during such further time as he may continue to hold said office," must be held to apply to such further time beyond the term of one year as the principal might hold the office by virtue of his first election, and that it was not intended to cover the time under which he might hold office under any subsequent election.

Exceptions overruled.

OFFICIAL BONDS.—THE LIABILITY OF SURETIES on official bonds for the acts of their principal after the expiration of his term, or upon his holding over, is discussed in the monographic note

to *Crawn v. Commonwealth*, 10 Am. St. Rep. 843-860; *King County v. Ferry*, 5 Wash. 536, 34 Am. St. Rep. 880. The liabilities of sureties on official bonds cannot be extended by construction or doubtful interpretation: See the monographic note to *Commonwealth v. Cole*, 46 Am. Dec. 509.

COCHRANE v. COMMONWEALTH.

[175 Massachusetts, 299.]

EMINENT DOMAIN—DAMAGES—VALUE OF LAND.—Where property is taken under the right of eminent domain, the damages must be measured by the injury to the fair market value of the land at the time of the taking.

WITNESSES — EXPERT — QUALIFYING — VALUE OF LAND.—Ordinarily, the proper way to qualify one as a witness to value of property, is to show that he is familiar with sales of similar property and the prices paid therefor.

EMINENT DOMAIN.—THE MARKET VALUE of a piece of property is its value in view of all the purposes to which it is naturally adapted, whether actually used for those purposes or not.

EMINENT DOMAIN—DAMAGES—VALUE OF UNOCCUPIED LANDS FOR SPECIAL USE.—Where, under the right of eminent domain, an injury is done to property which is not commonly bought and sold, the amount of such injury may be ascertained by allowing testimony to be given of the value of the land for the special purpose for which it is by nature adapted, though it is not then used therefor, such testimony to be given by persons qualified to testify thereto from knowledge derived from experience in their own business in which they have dealt with similar property; but such testimony is admitted only when without it it is impossible to prove the value of the property in question.

J. M. Hallowell, assistant attorney general, for the commonwealth.

M. Storey, for the petitioner.

²⁹⁹ LORING, J. The only exception presented in this case is that to the admission of the testimony of Kelsey L. Gilmore.

³⁰⁰ The petition was brought to recover damages sustained by reason of a taking of the right to maintain a sewer through the land of the petitioner under the Metropolitan sewer act; Stats. 1895, c. 406. The land of the petitioner was situated on each side of a stream known as "Mother brook," running through a channel originally constructed in 1640, and connecting the Charles and Neponset rivers, and through which a large amount of water ran from the Charles to the Neponset. The line of the commonwealth's taking was more or less parallel

with the line of the brook, and ran through the petitioner's land from one end of it to the other. The petitioner introduced evidence tending to show "that the plaintiff's property was valuable as a millsite, and that its value was largely derived from the fact that the relation between the stream and the adjoining land made it possible to send a large quantity of water by gravity through any building that might be erected on the premises; that the quantity and quality of the water supply made the site especially valuable for any manufacturing business where a large quantity of water was needed for cleansing or like purposes, such as bleaching, dyeing, and printing factory or a paper mill; that the value of a millsite for manufacturing purposes did not depend on the value of real estate for general purposes in the neighborhood, and that some of the most valuable millsites were remote from any town. The petitioner called various expert witnesses, including manufacturers and mill engineers. The engineers testified to the injury caused to the property by the sewer taking arising from the additional difficulty and expense necessitated in the construction and location of mill buildings and the subsequent conduct of a manufacturing business."

Among other witnesses, the petitioner called Kelsey L. Gilmore, who testified that he lived in Lexington, Massachusetts, and had been engaged in the city of Somerville for forty-one years in the business of bleaching, dyeing, printing, and finishing cotton goods; that he bought the mill in which he was manufacturing in Somerville in 1878; that he never bought any other mill or millsite and never sold a mill or millsite; that he did not know of purchases or sales of millsites; that he had examined the land of the petitioner in question with reference to forming an opinion as to its availability for a site for a mill ²⁰¹ for bleaching, dyeing, cleansing, and printing; that it was a very fine spot for a mill of that kind, on account of the supply of water which it had and the fact that the land of the petitioner was land lying below the head of the water, giving sufficient room for buildings, so that the water could flow through without pumping; that, from his experience, he knew what the value of a place of that kind is as a site for a mill for bleaching, dyeing, cleansing, and printing; that he had made no investigations in the neighborhood or elsewhere as to what the value of this site was for a mill of the kind described, or as to the value of this combination of land and water, but he had his own opinion about it from his own experience.

The court ruled: "If the witness states that he is familiar with the values of properties of this sort, of this kind, although for a particular purpose, I do not think his testimony incompetent. I think if he can say that he is familiar generally with the value of property of this kind, that he may testify." The witness was then asked: "Please state in your opinion what is the value of that combination there, that land and water there. What is the value, the fair market value of this combination of land here with the water power for the purposes of a printing business?" and answered, "I should think that with that amount of land, with that combination of land and water, that fifty thousand dollars would be a very low price for it." The defendant excepted to this question and answer.

The defendant is right in his contention that the damages must be measured by the injury to the fair market value of the plaintiff's land at the time of the taking: *Providence etc. R. R. Co. v. Worcester*, 155 Mass. 35; *Moulton v. Newburyport Water Co.*, 137 Mass. 163; and he is also right in his contention that where similar land is commonly bought and sold, the testimony of a witness, when found by the presiding justice to be competent to testify to its value, should ordinarily be limited on direct examination to giving a direct answer to the question, What is its fair market value, in view of all the purposes to which it is naturally adapted? *Manning v. Lowell*, 173 Mass. 100. The defendant is also right in his contention that ordinarily the proper way to qualify a witness as a witness to value of property is to show that he is familiar with sales of similar property and the prices paid therefor: *Lyman v. Boston*, 164 Mass. 99.

³⁰² But cases sometimes arise involving injury to property which is not commonly bought and sold. In a case involving injury to such property, to confine the owner of it to witnesses who show themselves qualified to testify to its value by their knowledge of sales of similar property, would be to deny the owner the right to prove what the true value of his property was. The market value of a piece of property is its value in view of all the purposes to which it is naturally adapted; that means that its market value, if it is unoccupied, is fixed by its value for the most valuable of those purposes. When an injury is done to property which is not commonly bought and sold, and a case arises in which the amount of that injury must be ascertained, it is proper to allow testimony to be given of its value for the special purpose for which it is used, and to allow that testimony to be given by persons who show themselves

qualified to testify thereto from knowledge derived from experience in their own business in which they have dealt with similar property. The value of land actually used for manufacturing purposes is an illustration of property of this description, and testimony of persons to its value for manufacturing purposes was admitted in *Lowell v. County Commrs.*, 146 Mass. 403, though the persons testifying had no knowledge of purchases or sales of similar land and were qualified to testify as they did solely from knowledge derived from their experience as manufacturers. For similar cases, see *Warren v. Spencer Water Co.*, 143 Mass. 155, and *Manning v. Lowell*, 173 Mass. 100.

And so when it was proved that the land in question in the case at bar is by nature adapted for use as a millsite for dye-works or for a print-mill, it was proper for the presiding justice in his discretion to allow testimony to be given as to its value for such purposes, by persons who have been shown to be qualified to testify thereto by knowledge thereof derived from experience in that business, though the land was not then used therefor. To exclude such evidence would be to deny to the owner the power of proving the real value of that property; no one can testify to that value by knowledge derived from the sale of lands in the neighborhood; they are not similar lands; nor by sales of millsites for such purposes, for millsites are not commonly bought and sold. Evidence of the value of the property ~~as~~ as a millsite for such purposes, given by persons who have knowledge thereof derived from experience in that business, must be admitted from the necessity of the case.

But such testimony is objectionable as not being directly responsive to the question to be passed upon by the jury, namely, What is the injury to the fair market value of the property in view of all the purposes for which it is adapted by nature, including the specific purpose testified to, to which it has not in fact been devoted? By reason of its not being directly responsive, and by reason of the land not being in fact devoted to the specified purpose, such evidence raises many issues which, if it were possible, should not be raised. It is also objectionable because it may come as a surprise to the other party, who may have failed to anticipate that the case was an exceptional one, and who for that reason may not be prepared to meet any but direct evidence of the market value of the land as shown by purchases and sales in the neighborhood. For these reasons,

the usual rule should be departed from and testimony of this kind admitted only when without it it is impossible to prove the value of the property in question.

The defendant also contends that the question which the witness answered was the value of the land as a millsite, independent of the locality, and that such a question is, at the least, inadmissible. But no such question was put to the witness, and there is no reason to suppose that the witness supposed he was answering such a question. Counsel for the petitioner did at one point in the preliminary examination of the witness say to him: "What I am getting at here is the value of that supply of water in connection with the land—what is the value of that combination? I mean that value which is independent of the neighborhood which lies behind it—its value for manufacturing purposes." But after that question eighteen questions were put to the witness and a discussion by counsel ensued before the court ruled that the witness was qualified to testify to value and before the question as to the value of the petitioner's land stated above was put to him. Under these circumstances, we do not think that the question ultimately put could have been understood by the witness as having been qualified by this statement made by the counsel in the preliminary examination.

Exceptions overruled.

EMINENT DOMAIN—MEASURE OF DAMAGES.—In estimating the value of property taken for a public use, it is the market value which is to be considered, and in estimating such value all the capabilities of the property and all the legitimate uses to which it may be applied or for which it is adapted, are to be considered, and not merely the condition it is in and the use to which it is at the time applied by the owner: *McKinney v. Nashville*, 102 Tenn. 131, 73 Am. St. Rep. 859.

OPINION EVIDENCE AS TO VALUE OF LAND.—In an action for damages to property arising from the construction of a railroad, a witness who has knowledge of the property is competent to testify as to whether its value has been increased or diminished by the construction of the road, and if diminished thereby, he is competent to testify as to the amount: *Beck v. Pennsylvania etc. R. R. Co.*, 148 Pa. St. 271, 33 Am. St. Rep. 822.

COMMONWEALTH v. REAGAN.

[175 Massachusetts, 835.]

WITNESSES—COMPETENCY OF CHILD.—When a witness is called, and it is objected that by reason of insanity or youthfulness he does not understand the nature of the oath, and is therefore incompetent, it is the duty of the judge to examine into the question of his competency, and to reject him unless he is satisfied he is competent.

Indictment, charging an assault upon a little girl five years old. At the trial she was called as a witness and allowed to testify.

C. S. Sullivan, for the defendant.

J. D. McLaughlin, second assistant district attorney, for the commonwealth.

835 HAMMOND, J. As the result of the voir dire examination of the witness the judge was of the opinion that she was not competent, but no formal order or ruling was made, and he permitted her to be sworn and to testify, stating that he should leave the question of her competency to the jury. In his charge to them he gave full and careful instructions as to the law material to that issue, and told them that if they found her competent they should take her statements as evidence, otherwise **836** they were to disregard all she had said, and deal with the case as though she had not been called. The evidence as to her competency is not before us, but from the course taken by the judge we must assume that in his judgment it would warrant a finding by the jury that she was competent. The defendant excepted to this course, contending that it was the duty of the court alone to decide that question. The jury brought in a verdict of guilty, and, in reply to the question put by the court, said that they found the witness competent, and in reaching their verdict they treated her as such and relied in part on her testimony. We assume that her testimony was prejudicial to the defendant, and therefore the simple question raised on the report is whether there was error in law in the method of dealing with the question of the competency of the witness.

Speaking generally, the text-books on evidence lay down the proposition that in a jury trial all questions as to the admissibility of evidence are for the judge. Thus Starkie says: "In civil as well as criminal proceedings, the competency of an in-

fant is a question of discretion of the court": 2 Starkie on Evidence, 4th Am. ed., 393.

Phillips says: "It is the province of the judge presiding at the trial to decide all questions on the admissibility of evidence; it will be for the judge also to decide any preliminary question of fact, however intricate, the solution of which may be necessary for enabling him to determine the other question of admissibility": 1 Phillips on Evidence, 4th Am. ed., 3. And again he says that the competency of a witness is a condition precedent to admitting his evidence. "The judge alone has to decide whether such condition precedent has been fulfilled. If proof is offered by witnesses, he is to decide upon their credibility. If counter-evidence is proposed, he must receive it before he decides; and he has no right to ask the opinion of the jury on the fact as a condition precedent": 1 Phillips on Evidence, 4th Am. ed., 6.

Roscoe says: "It is for the court to decide upon the competency of witnesses, and for the jury to determine their credibility": Roscoe's Criminal Evidence, 12th ed., 100. The rule is laid down by Greenleaf, Taylor, and Wharton in equally positive terms: 1 Greenleaf on Evidence, secs. 81e, 161b; Taylor on Evidence, 23a; Wharton on Criminal Evidence, secs. 370, 373.

³³⁷ And this is so whether the objection to the competency is made upon the ground of interest, insanity, or infancy. Other familiar examples of the application of the rule are where confessions or dying declarations are offered in evidence. It is stated by Greenleaf that if the decision of the admissibility of the evidence depends upon the decision of other questions of fact, as, for example, the fact of interest of the witness or the due execution of a deed, in such cases it is allowable for the judge at his discretion to submit the question of the admissibility of the evidence to the jury, with instructions to consider it as evidence or not, according as they decide that question: 1 Greenleaf on Evidence, sec. 81e; *Gordon v. Bowers*, 16 Pa. St. 226.

But these cases are regarded as exceptions to the general rule, and it may be doubted whether the language of Greenleaf is not too broad, as applied at least to the practice in England and to criminal cases: See 1 Phillips on Evidence, 4th Am. ed., 6, and the language of Erle, J., during the argument in the case of *Jenkins v. Davies*, 10 Q. B. 314, 320, and of Denman, C. J.,

in delivering the judgment of the court in the same case, at page 323.

But whatever may be the scope of this exception, it is certain that in the case of dying declarations, infancy, and insanity the rule itself is very strictly adhered to. It is true that in *Rex v. Woodcock*, 1 Leach C. C. 500, Eyre, C. B., left to the jury the question whether the deceased was aware that she was in a dying condition at the time of making the declarations offered as dying declarations. That case, however, has not been followed, but has been virtually overruled by subsequent cases.

In *Welbourn's Case*, 1 East P. C. 358, 360, which was an indictment for murder, evidence was admitted of statements as dying declarations. The preliminary question was whether the deceased knew she was dying. It was left to the jury to say upon the whole evidence whether they were satisfied that the deceased knew her situation at the time she made the statements. The prisoner was convicted. The case being referred to the judges, they decided by a majority opinion that it did not sufficiently appear that she knew she was in a dying state when she made the statements; "and they all agreed that whether the deceased thought herself in a dying state or not was matter to be decided by the judge in order to receive or reject ³³⁸ the evidence, and that that point should not be left to the jury." To the same effect is *John's Case*, 1 East P. C. 357. See, also, *Rex v. Hucks*, 1 Stark. 521, 522, and a note to the same at the end of the case by Starkie, wherein he says that the decision in *Rex v. Woodcock*, 1 Leach C. C. 500, is inconsistent with principle. See, also, *Bartlett v. Smith*, 11 Mees. & W. 483; *Jenkins v. Davies*, 10 Q. B. 314, 320; *Harris v. Great Western Ry. Co.*, 1 Q. B. Div. 515, 533; *Regina v. Hill*, 5 Cox C. C. 259; *Regina v. Perkins*, 2 Moody C. C. 135; *Carpenters' Co. v. Hayward*, 1 Doug. 374, 375; *Buller's Law of Nisi Prius*, 297.

The practice in this commonwealth is stated by Morton, C. J., in *Commonwealth v. Preece*, 140 Mass. 276, as follows: "When a confession is offered in evidence, the question whether it is voluntary is to be decided primarily by the presiding justice. If he is satisfied that it is voluntary, it is admissible; otherwise, it should be excluded. When there is conflicting testimony, the humane practice in this commonwealth is for the judge, if he decides that it is admissible, to instruct the jury that they may consider all the evidence, and that they should exclude the confession, if, upon the whole evidence

in the case, they are satisfied that it was not the voluntary act of the defendant."

In *Commonwealth v. Culver*, 126 Mass. 464, Lord, J., alluding to the practice sometimes followed in a criminal case, where an objection to an alleged confession of a defendant is made upon the ground that it was improperly obtained, for the judge to allow the confession and all the evidence bearing upon the manner in which it was obtained to be submitted to the jury, either to be rejected wholly by them, or to be allowed such weight as under all the circumstances they think proper, says that this is done rather by consent than otherwise, neither party desiring to take the decision of the judge upon the question; but he adds: "The prisoner has always the right to require of the judge a decision of the competency of the evidence; and, even after the judge has decided the evidence to be competent, the prisoner has the right to ask of the jury to disregard it, and to give no weight to it, because of the circumstances under which the confessions were obtained." And the practice, as thus stated, is well settled in this commonwealth: ²³⁹ *M'Managil v. Ross*, 20 Pick. 99; *Dole v. Thurlow*, 12 Met. 157; *Commonwealth v. Brown*, 14 Gray, 419; *Commonwealth v. Mullins*, 2 Allen, 295; *O'Connor v. Hallinan*, 103 Mass. 547; *Commonwealth v. Coe*, 115 Mass. 481; *Commonwealth v. Preece*, 140 Mass. 276; *Commonwealth v. Bond*, 170 Mass. 41, and cases there cited. As to decisions in other states upon the question, see *Hughes v. Detroit etc. Ry. Co.*, 65 Mich. 10; *Carter v. State*, 63 Ala. 52, 35 Am. Rep. 4; *People v. McNair*, 21 Wend. 608; *McGuire v. People*, 44 Mich. 286, 38 Am. Rep. 265; *State v. Edwards*, 79 N. C. 648; *People v. Linzey*, 79 Hun, 23; *Flanagan v. State*, 25 Ark. 92; *Coleman v. Commonwealth*, 25 Gratt. 865, 18 Am. Rep. 711; *People v. Bernal*, 10 Cal. 66; *Simpson v. State*, 31 Ind. 90; *State v. Le Blanc*, 3 Brev. 339; *Lester v. State*, 37 Fla. 382; *Holcomb v. Holcomb*, 28 Conn. 177; *State v. Whittier*, 21 Me. 341, 347, 38 Am. Dec. 272; *Cook v. Mix*, 11 Conn. 432; *State v. Scanlan*, 58 Mo. 204; *Peterson v. State*, 47 Ga. 524; *Mead v. Harris*, 101 Mich. 585; *Bowdle v. Detroit Street Ry. Co.*, 103 Mich. 272, 50 Am. St. Rep. 366.

The rule conduces to the orderly and efficient conduct of a trial. It is also of the gravest importance in a criminal case that the radical question whether a witness understands the nature of an oath should be considered by itself in the first instance, free from any complication with the nature of the

evidence he is expected to give, or its bearing upon the issues of the case.

When the decision is to be made by a mind so situated as to be in danger of being influenced by the nature of the story as told by the witness and the importance of the testimony and its bearing one way or the other, it is plain that the decision is not so likely to be upon the real merits of the question as it otherwise would be; and it is easy to see, as indeed this very case may, perhaps, show, that with the whole case before the jury there is danger that the question of the competency of a witness may be decided according as his testimony may be legally necessary to sustain a view of the case which the emotions of the jury may lead them to take, if they can find evidence enough to justify them.

Upon principle, and by an overwhelming weight of authority in England and in this country, we are satisfied that when ⁶⁴⁰ a witness is called, and it is objected that by reason of insanity or youthfulness he does not understand the nature of the oath, and is therefore incompetent, it is the duty of the judge to examine into the question of his competency, and to reject him unless he is satisfied that he is competent. Against the objection of the prisoner a different course was taken in this case. The judge was of the opinion that the witness was not competent. It was the right of the prisoner upon that finding to have the witness excluded.

The verdict should be set aside. Since it is possible that at another trial the witness, by reason of mental development and instruction, general and special, may have sufficient comprehension of the nature and obligation of an oath to satisfy the court that she is a competent witness, we make no further order.

Verdict set aside.

WITNESS.—THE COMPETENCY OF A CHILD as a witness is within the discretion of the trial court, and is to be determined by an examination of the child: Note to McGuff v. State, 16 Am. St. Rep. 31. In a criminal prosecution, a child of six or seven years may be a competent witness, if the judge is satisfied of his intelligence and the jury is instructed properly: McGuire v. People, 44 Mich. 286, 38 Am. Rep. 265.

WHIPPLE v. DUTTON.

[175 Massachusetts, 365.]

PLEDGE—UNAUTHORIZED SALE OF PROPERTY—LIABILITY.—A pledgee, who makes a sale of the pledged property in a manner unauthorized by law, does not thereby lose his lien and become liable to the pledgor for the value of the property, but is liable only for such damages as the pledgor may have sustained.

Tort for the conversion of five hundred bicycles. The defendants loaned money to the plaintiff's assignor, a corporation, and for its payment received notes secured by a pledge of the bicycles in dispute. The notes were not paid at maturity and were never paid, the borrowing corporation became insolvent, and the plaintiffs were appointed assignees. Subsequently to the insolvency the defendants sold the bicycles at private sale, without serving notice on the corporation or the plaintiffs, but the secretary of the corporation knew that sales were being made and made no objection. The sales were made openly and at favorable prices, and defendants used good judgment and diligence in effecting the sales. All the bicycles were sold. Judgment for the defendants.

W. R. Sears, for the plaintiffs.

E. A. Whitman, for the defendants.

³⁶⁷ MORTON, J. We assume, as the defendants contend, that the transactions of June 26th constituted a pledge of the bicycles received by the defendants, and that the subsequent sales as ³⁶⁸ made by the defendants were unauthorized. But it does not follow that the plaintiffs are entitled to recover the value of the bicycles thus sold. The defendants had possession of the bicycles, and had a lien on them for sums lent to the bicycle company which were overdue and unpaid. They had a right to foreclose the pledge in any manner authorized by law. The plaintiffs contend that they foreclosed in a manner unauthorized by law. But the only effect, it seems to us, of the unauthorized sales by the defendants was to entitle the plaintiffs to recover any damages sustained thereby. The plaintiffs admit in substance that the defendants used good judgment and diligence in selling and that the sales were effected at favorable prices, and it does not appear that the proceeds were more than enough to pay what was due the defendants. Under such circumstances, we fail to see how the plaintiffs have sustained any

damage. It would be singular if, having a right to foreclose the pledge, the defendants should be held to have lost their lien and to be liable for the value of the bicycles, because, without inflicting any damage thereby on the pledgor, they went the wrong way about the foreclosure, or claimed a greater right than they actually had. We do not think that such is the law: See *Dahill v. Booker*, 140 Mass. 308, 54 Am. Rep. 465; *Farrar v. Paine*, 173 Mass. 58, and cases cited; *Halliday v. Holgate*, L. R. 3 Ex. 299; *Johnson v. Stear*, 15 Com. B., N. S., 330.

Other questions have been raised and argued which, in consequence of the views expressed above, it does not seem to us necessary to consider.

Exceptions overruled.

IF A PLEDGEE SELLS THE PROPERTY WITHOUT NOTICE to the pledgor, the latter may recover the value of the property of the former without tendering payment of the debt: *Stearns v. Marsh*, 4 Denio, 227, 47 Am. Dec. 248.

COLLATERAL SECURITY is the subject of the monographic note to *Griggs v. Day*, 32 Am. St. Rep. 711-731.

VONDAL v. VONDAL

[175 Massachusetts, 383.]

MARRIAGE—NULLITY OF—VENEREAL DISEASE.—The concealed existence in one of the parties to a marriage of a venereal disease known as syphilis, which can be so treated that it will not be communicated to the other, is not a sufficient ground for a decree of nullity of marriage.

Libel for a sentence of nullity of marriage.

C. W. Cuahing, for the libelant.

J. F. Kilton, for the libelee.

³⁸³ BARKER, J. Although at the time of her marriage the libelee was afflicted with syphilis, and knew of her disease and ³⁸⁴ concealed it from the libelant, the disease at that time was probably not contagious, and could have been so treated that it would not be communicated by contagion, and so as probably to make her free from suffering any ill-effects from the disease.

It is to be presumed that she could bear children, although her offspring would probably have been affected by the disease. The marriage was followed by cohabitation for four months, and consummation must be presumed.

As was plainly intimated in *Smith v. Smith*, 171 Mass. 404, 410, 68 Am. St. Rep. 440, the concealed existence of venereal disease of such a character, in one of the parties to a marriage which has been consummated, is not a sufficient ground for a decree of nullity of marriage.

Exceptions overruled.

A MARRIAGE MAY BE ANNULLED for pre-existing incurable syphilis affecting the wife: *Ryder v. Ryder*, 66 Vt. 158, 44 Am. St. Rep. 833. See, further, the monographic note to *Van Houten v. Morse*, 44 Am. St. Rep. 385; *Smith v. Smith*, 171 Mass. 404, 68 Am. St. Rep. 440.

PALMER v. NORTHERN MUTUAL RELIEF ASSN.

[175 Massachusetts, 396.]

GARNISHMENT OF TRUST FUNDS.—A fund held in trust for another, in which the trustee has no beneficial interest, cannot be attached for the debts of such trustee.

GARNISHMENT—FUNDS OF MUTUAL BENEFIT ASSOCIATION.—In an action against a mutual benefit association to enforce a judgment founded upon a claim for a death benefit under a certificate of membership, the plaintiff cannot attach a fund of the association set aside for the payment of death benefits, and paid in by members for that express purpose; the plaintiff's rights as a beneficial owner of such fund can be determined only by a bill in equity.

A. P. French, for the plaintiff.

E. Lowe, for the defendant.

³⁹⁶ LORING. J. This is an action on a judgment for \$3,019.03, in which the plaintiff seeks to recover the balance due thereon with interest, after crediting a payment received from the defendant of \$738.48. The action was begun by trustee process, and the Old Colony Trust Company, summoned as trustee, answered that it had in its hands two sums, one amounting to \$78.46, and the other to \$845.23; and it is agreed that "both said \$78.46 and said \$845.23 were, at the time of said trustee attachment, a part of the funds of the defendant asso-

ciation set aside for the payment of death benefits, and paid in by members for that express use."

The death benefit fund of a beneficiary association organized under the Public Statutes, chapter 115, amended by the Statutes of 1877, chapter 204, and the Statutes of 1880, chapter 196, is in its essential characteristics a trust fund, and it is so designated by the legislature. The Statutes of 1877, chapter 204, is the first statute directly authorizing persons to associate themselves together to provide for the payment on their death of a pecuniary ³⁹⁷ benefit to those dependent upon them. The death benefit to be paid on the decease of each member was not to be raised by an assessment levied at his death, but was to be paid out of a fund to be created by levying an assessment on all living members, and to be "held by such association until the death of a member occurs," when the amount due those claiming under the deceased member was to be paid forthwith. The Statutes of 1880, chapter 196, limiting the amount of the death fund to be held by beneficiary associations to one assessment of general membership or the aggregate of one assessment of each limited membership, and also to the sum of \$10,000, and directing in what securities the fund should be invested, recognized that the death fund to be created under the Statutes of 1877, chapter 204, section 1, was a fund not belonging to the beneficiary association, but held by it in trust for others; in this act the fund is spoken of "as a death fund belonging to the beneficiaries of anticipated deceased members," and it is provided "that such death fund while held in trust" shall be invested in the manner therein specified; and in every subsequent enactment the fund has been so designated: Stats. 1888, c. 429, sec. 9; Stats. 1890, c. 341, sec. 9; Stats. 1894, c. 367, sec. 8; Stats. 1898, c. 474, sec. 11; Stats. 1899, c. 442, sec. 12. This court, in ordering the distribution of the death fund of insolvent beneficiary associations, proceeded upon the theory that it was "a fund which the defendant corporation was to keep identified, and hold in trust for distribution among the policy holders when the time came. The fund is expressly called a trust by section 8 of the statute": Holmes, J., in *Fogg v. United Order of the Golden Lion*, 156 Mass. 431, 434, and in the case in which it was decided that a beneficiary can sue for the death benefit it was said: "This statute, like the statute of 1885, . . . treats the amount to be paid as the property of the beneficiaries, which they have a right to receive under the express provisions of the

law by virtue of their relation to the corporation, created by the certificate, in which the corporation recognizes them as beneficiaries entitled, on the happening of a contingency, to a fund which is collected and held in trust for them, in accordance with the requirements of the statute and of the by-laws of the corporation": Knowlton, J., in *Dean v. American Legion of Honor*, 156 Mass. 435, 438. See, also, *Buswell v. Order of the Iron Hall*, 161 Mass. 224, 231, 232.

³⁹⁸ The Statutes of 1877, chapter 204, section 1, also provided that: "Such fund so held shall not be liable to attachment by trustee or other process." It appears from subsequent acts, codifying the law of beneficiary associations, that this provision means that the interest which a member, or those claiming under a member, have in the death fund shall not be attached in an action against them or either of them: Stats. 1888, c. 429, sec. 15; Stats. 1894, c. 367, sec. 14; Stats. 1898, c. 474, sec. 17; and it is argued by the plaintiff that inasmuch as this provision of the statute does not exempt the fund from attachment in actions against the association, it can be so attached. But that argument loses sight of the fact that the death fund of a beneficiary association is a fund not belonging to the association as its own, but held by it in trust for those entitled under the certificates of membership in that association; and it does not require a statute to provide that a fund held by A in trust for B, in which A has no beneficial interest, cannot be attached for the debts of A—that is the rule of the common law. For a case where it was held that a similar trust fund could not be attached by persons having claims against a similar association, see *Burdon v. Massachusetts Safety Fund Assn.*, 147 Mass. 360; for instances of similar trust funds, see *Coe v. Washington Mills*, 149 Mass. 543; *American Loan etc. Co. v. Northwestern Guaranty Loan Co.*, 166 Mass. 337.

The plaintiff contends that however it may be in case of other claims, one whose claim is for a death benefit under a certificate of membership has a claim upon the death fund, and can attach it in a suit to collect the amount due him as a death benefit. It may be that such a person has a claim upon the death fund; but if he has, his remedy in case the defendant association refuses to pay a judgment which he has obtained on his certificate of membership is a bill in equity to enforce his rights as one of the beneficiaries for whose benefit the death fund is held, and not an action at law suing the association and trusteeing the death fund. Such a person could have his execu-

tion satisfied out of any general funds belonging to the association, if he could direct the sheriff where to put his hands upon them; or in a suit on the judgment he could trustee such funds. Beneficiary associations have the right to acquire such general funds for expenses and similar purposes by levying the payment of a ~~sum~~ fixed sum at stated times: See *Burdon v. Massachusetts Safety Fund Assn.*, 147 Mass. 360, 363; or, when no such dues are payable, by levying assessments: Stats. 1894, c. 367, sec. 9; Stats. 1898, c. 474, sec. 12; Stats. 1899, c. 442, sec. 16.

The peculiarity of the case at bar lies in the fact that the parties have agreed that "the amount paid by the defendant association on account of the execution in the original suit, to wit, \$738.48, was the amount received from the last assessment upon the members of the defendant association paid prior to the death of the plaintiff's intestate"; in view of that fact, the payment of the \$738.48 was a full compliance with the contract between the association and the plaintiff's intestate, which provided that "if the amount received from the last assessment paid prior to said death is less than \$2,000, the beneficiary of a member of the first rate shall not receive more than the amount of said assessment"; and the only possible explanation of the judgment which the plaintiff recovered against the defendant is that that fact was not proved at the trial, and consequently a verdict for the full \$2,000 and interest was entered. Whether those interested as beneficiaries in the death fund are estopped by the judgment to deny the fact here agreed upon as a judgment recovered against the association as representing them is not now before the court.

It also appears from the facts in the case at bar that the \$78.46 and \$845.23 which were held by the Old Colony Trust Company at the time it was served as trustee are funds which "were assessed and collected from the members of the defendant association subsequent to said payment by it of \$738.48 on account of the execution in the original suit"; and that checks for the two sums making up the fund in the hands of the Old Colony Trust Company had been drawn before the trustee process was served to pay that fund to the persons who, independently of the judgment rendered in this case, would be entitled thereto.

It is apparent, therefore, that the question whether the plaintiff is entitled to any part of the fund in the hands of the Old Colony Trust Company depends upon questions which can

properly be raised only in a bill in equity brought to ascertain the beneficial ownership in said funds in which the other parties who claim to be entitled to it are parties. The entry must be, judgment discharging trustee affirmed.

GARNISHMENT OF TRUST FUNDS.—A judgment debtor cannot have his debt satisfied out of property held in trust for another: **Marx v. Parker**, 9 Wash. 473, 43 Am. St. Rep. 849.

GLYNN v. CENTRAL RAILROAD COMPANY.

[175 Massachusetts, 510.]

RAILROADS—LIABILITY OF FIRST OF TWO RAILROADS FOR DEFECT IN CAR.—If a railroad car has passed from the control of one company into that of another, and before it reaches the place of accident it has passed a point at which the cars are inspected, the responsibility of the first railroad company for a defect in the car which was not secret is at an end.

NEGLIGENCE—LIABILITY OF OWNER OF DEFECTIVE PROPERTY—CHANGED POSSESSION.—When a person is to be charged because of the construction or ownership of an object which causes damage by some defect, commonly the liability is held to end when the control of the object is changed.

G. W. Anderson and S. A. Fuller, for the plaintiff.

R. Thorne and C. F. Choate, Jr., for the defendant.

§10 HOLMES, C. J. This is an action for personal injuries. The plaintiff was at work for the New York, New Haven, and Hartford Railroad Company, at Stonington, Connecticut, and was engaged in coupling a train to a car belonging to the defendant, when his sleeve was caught by a bolt projecting from the deadwood of the car and his hand was crushed. We assume that the car was in such a condition that, apart from the question of **§11** notice, it would have warranted a finding that the defendant was liable, had the car been in its possession and the plaintiff in its employ. We assume further, without deciding, that the evidence warranted a finding that the car had come from the possession of the defendant recently, and in the same condition as that in which it was at the time of the accident. But nevertheless we are of opinion that the judge who tried the case was right in directing a verdict for the defendant.

There was no dispute that after the car had come into the hands of the New York, New Haven, and Hartford Railroad, and before it had reached the place of accident, it had passed a point at which the cars were inspected. After that point, if not before, we are of opinion that the defendant's responsibility for the defect in the car was at an end.

There is more obscurity than there ought to be, perhaps, upon the limits of liability in general. The fact that the damage complained of would not have happened but for the intervening negligence of a third person has not always been held a bar, although negligent conduct, so far as it is a tort, is unlawful in as full a sense as malicious conduct, and although ordinarily even a wrongdoer would not be bound to anticipate a willful wrong by a third person: See *Elmer v. Locke*, 135 Mass. 575, 576, and cases cited in *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 48, 4 Am. St. Rep. 279; *Engelhart v. Farrant*, [1897] 1 Q. B. 240. Compare *Hayes v. Hyde Park*, 153 Mass. 514-516. But when a person is to be charged because of the construction or ownership of an object which causes damage by some defect, commonly the liability is held to end when the control of the object is changed.

Thus the case of *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 4 Am. St. Rep. 279, just cited, shows that the mere ownership of a house so constructed that its roof would throw snow into the street, and therefore threatening danger as it is without more, whenever snow shall fall, is not enough to impose liability when the control of it has been given up to a lessee who, if he does his duty, will keep it safe. In the case at bar the car did not threaten harm to anyone, unless it was used in a particular way. Whether it should be used in a dangerous way or not depended, not upon the defendant, but upon another road. Even assuming that the car had come straight from the defendant at Harlem river, the defendant did no unlawful act in handing it over. Whatever may be said as to the ⁵¹² responsibility for a car dispatched over a connecting road before there has been a reasonable chance to inspect it, after the connecting road has had the chance to inspect the car and has full control over it, the owner's responsibility for a defect which is not secret ceases: See *Sawyer v. Minneapolis etc. Ry. Co.*, 38 Minn. 103, 8 Am. St. Rep. 648; *Wright v. Delaware etc. Canal Co.*, 40 Hun, 343; *Mackin v. Boston etc. R. R. Co.*, 135 Mass. 201, 206, 46 Am. Rep. 456.

Upon the same principle that commonly when a new control comes in the former responsibility is at an end, a vendor who makes no representation is not liable to a remote purchaser of the article sold, for damage done by defects in it: *Davidson v. Nichols*, 11 Allen, 514, 518; *Losee v. Clute*, 51 N. Y., 494, 10 Am. Rep. 638; *Curtin v. Somerset*, 140 Pa. St. 70, 23 Am. St. Rep. 220; *Necker v. Harvey*, 49 Mich. 517, 519. An extreme case is *Collis v. Selden*, L. R. 3 Com. P. 495.

It is recognized in *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 4 Am. St. Rep. 279, that the rule is different when the use from which the damage ensued plainly was contemplated by the lease: *Jackman v. Arlington Mills*, 137 Mass. 277; *Harris v. James*, L. J. 45 Q. B. 545. See *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311. In *Heaven v. Pender*, 11 Q. B. 503, 515, it was considered that the use not only was contemplated but was invited: See *Blakemore v. Bristol etc. Ry. Co.*, 8 El. & B. 1035, 1052, 1053. But contemplation means a good deal more than simply recognizing a probability. In *Sowell v. Champion*, 2 Nev. & P. 627, 634, it was held that an act generally lawful, such as placing a writ for execution in the hands of an officer, was not made unlawful by a full persuasion or even knowledge that the officer was likely to execute it in a place which might and did turn out to be out of his jurisdiction. The officer had an unfettered right of decision, and it was his lookout to see that he kept within the law: See *Kahl v. Love*, 37 N. J. L. 5; *Savings Bank v. Ward*, 100 U. S. 195. So here as to the car. There has been a suggestion in some cases of a more severe rule in the case of very dangerous agencies: *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 543; *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. Rep. 400. But whether there be any such qualifications or not the present case is not within it. If it had appeared that the use made of the car was contemplated by the defendant, it still would have been a use subject to inspection, and of a car with no secret defect.

A RAILROAD USING THE CARS OF A CONNECTING LINE is liable to the same extent as if they were its own, if such cars, when received and used, are in a condition dangerous to its employes: *Reynolds v. Boston etc. R. R. Co.*, 64 Vt. 66, 33 Am. St. Rep. 908; *Ruppel v. Allegheny Valley Ry.*, 167 Pa. St. 166, 46 Am. St. Rep. 666. If a railroad company transfers a defective car to another company, without making a proper inspection thereof, either or both companies may be held liable for an injury resulting from the condition of such car: *Pennsylvania R. R. Co. v. Snyder*, 55 Ohio St. 342, 60 Am. St. Rep. 700.

SLAYTON v. BARRY.

[175 Massachusetts, 513.]

INFANTS—TORT LIABILITY—FRAUD INDUCING CONTRACT.—An infant cannot be held liable for fraud or conversion, where to maintain the action the plaintiff must show that there was a contract, which was part and parcel of the fraudulent transaction.

J. F. Wiggin, for the plaintiff.

W. F. Kimball, for the defendant.

513 MORTON, J. The declaration in this case is in two counts. The first count alleges in substance that the defendant, intending to defraud the plaintiff, deceitfully and fraudulently represented to him that he was of full age, and thereby induced the plaintiff **514** to sell and deliver to him the goods described, and though often requested had refused to pay for or return the goods but had delivered them to persons unknown to the plaintiff. The second count is in tort for the conversion of the goods described in the first count. The case is here on exceptions to the refusal of the presiding judge to give certain instructions requested by the plaintiff, and to his ruling ordering a verdict for the defendant. The question is whether the plaintiff can maintain his action. He could not bring an action of contract, and so has brought an action of tort. The precise question presented has never been passed upon by this court: *Merriam v. Cunningham*, 11 Cush. 40, 43. In other jurisdictions it has been decided differently by different courts. We think that the weight of authority is against the right to maintain the action: *Johnson v. Pie*, 1 Lev. 169; 1 Sid. 258; 1 Keb. 905; *Grove v. Nevill*, 1 Keb. 778; *Jennings v. Rundall*, 8 Term Rep. 335; *Green v. Greenbank*, 2 Marsh. 485; *Price v. Hewett*, 8 Ex. 146; *Wright v. Leonard*, 11 Com. B., N. S., 258; *De Roo v. Foster*, 12 Com. B., N. S., 272; *Gilson v. Spear*, 38 Vt. 311, 88 Am. Dec. 659; *Nash v. Jewett*, 61 Vt. 501, 15 Am. St. Rep. 931; *Ferguson v. Bobo*, 54 Miss. 121; *Brown v. Dunham*, 1 Root, 272; *Geer v. Hovy*, 1 Root, 179; *Wilt v. Welsh*, 6 Watts, 9; *Burns v. Hill*, 19 Ga. 22; *Kilgore v. Jordan*, 17 Tex. 341; *Benjamin on Sales*, 6th ed., sec. 23; *Cooley on Torts*, 2d ed., 126; *Addison on Torts*, Wood's ed., sec. 1314. See contra, *Fitts v. Hall*, 9 N. H. 441; *Eaton v. Hill*, 50 N. H. 235, 9 Am. Rep. 189; *Hall v. Butterfield*, 59 N. H.

354, 47 Am. Rep. 209; Rice v. Boyer, 108 Ind. 472, 58 Am. Rep. 53; Wallace v. Morss, 5 Hill, 391.

The general rule is, of course, that infants are liable for their ~~515~~ torts: Sikes v. Johnson, 16 Mass. 389; Homer v. Thwing, 3 Pick. 492; Shaw v. Coffin, 58 Me. 254, 4 Am. Rep. 290; Vasse v. Smith, 6 Cranch, 226. But the rule is not an unlimited one, but is to be applied with due regard to the other equally well-settled rule that, with certain exceptions, they are not liable on their contracts; and the dominant consideration is not that of liability for their torts, but of protection from their contracts. The true rule seems to us to be as stated in Liverpool Adelphi Loan Assn. v. Fairhurst, 9 Ex. 422, 429, where it was sought to hold a married woman for a fraudulent misrepresentation, namely, if the fraud "is directly connected with the contract . . . and is the means of effecting it, and parcel of the same transaction," then the infant will not be liable in tort. The rule is stated in 2 Kent's Commentaries, 241, as follows: "The fraudulent act, to charge him [the infant], must be wholly tortious; and a matter arising ex contractu, though infected with fraud, cannot be changed into a tort in order to charge the infant in trover or case by a change in the form of the action." In the present case it seems to us that the fraud on which the plaintiff relies was part and parcel of the contract and directly connected with it. The plaintiff cannot maintain his action without showing that there was a contract, which he was induced to enter into by the defendant's fraudulent representations in regard to his capacity to contract, and that pursuant to that contract there was a sale and delivery of the goods in question. Whether as an original proposition it would be better if the rule were as laid down in Fitts v. Hall, 9 N. H. 441, and Hall v. Butterfield, 59 N. H. 354, 47 Am. Rep. 209, in New Hampshire, and Rice v. Boyer, 108 Ind. 472, 58 Am. Rep. 53, in Indiana, we need not consider. The plaintiff relies on Homer v. Thwing, 3 Pick. 492, Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105, and Walker v. Davis, 1 Gray, 506. In Walker v. Davis, 1 Gray, 506, there was no completed contract and the title did not pass. The sale of the cow by the defendant operated, therefore, clearly as a conversion. Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105, was an action of replevin, and it was held that the property had not passed, or if it had that it had reverted in the plaintiff in consequence of the defendant's fraud. The plaintiff maintained his action independently of the contract. In Homer v. Thwing, 3 Pick. 492,

the tort was only incidentally connected with the contract of hiring.

We think that the exceptions should be overruled.

So ordered.

AN INFANT IS LIABLE FOR HIS TORTS, notwithstanding they may have arisen out of, or in some way may have been connected with, a contract: *Churchill v. White*, 58 Neb. 22, 76 Am. St. Rep. 64. See, further, the monographic note to *Craig v. Van Bebbler*, 18 Am. St. Rep. 720-724, on torts of infants connected with contracts.

ROSENTHAL v. NOVE.

[175 Massachusetts, 559.]

BANKRUPTCY PROCEEDINGS—EFFECT ON PENDING SUIT—SPECIAL JUDGMENT.—A court in which a suit against a bankrupt is pending is not, after the adjudication of bankruptcy, bound to stay further proceedings therein, though it may do so if justice so requires; the action is not absolutely barred, and the court has power to proceed to judgment. Hence, if after verdict and before judgment, the defendants are adjudicated bankrupts under the United States bankruptcy act, and thereafter they file a suggestion of that fact and move that all proceedings be stayed, the court has power to deny such motion and to direct the entry of a special judgment to enable the plaintiff to proceed against the sureties upon a bond to dissolve an attachment, given more than four months before the bankruptcy.

BANKRUPTCY COURT—EXAMINING DEFENDANTS' LIABILITY IN, AFTER VERDICT.—If, before the commencement of bankruptcy proceedings, in which the defendants are adjudged bankrupts, the right of a plaintiff to recover of the defendants a definite amount of damages has been fixed by the verdict of a jury, such right and liability cannot be re-examined in the bankruptcy court.

Tort for personal injuries.

W. S. B. Hopkins and R. Hoar, for the defendants.

J. R. Thayer and A. P. Rugg, for the plaintiff.

559 BARKER, J. After verdict and before judgment the defendants were adjudicated bankrupts, and thereafter they filed a suggestion of that fact and moved that all proceedings be stayed. This motion was denied and a special judgment entered to enable the plaintiff to proceed against the sureties upon a bond, given more than four months before the bankruptcy, to dissolve an attachment. The exceptions raise the question

whether the court had power to overrule the motion for a stay, and to direct the entry of a special judgment. The answer depends upon the provisions of the United States bankruptcy act of July 1, 1898. Section 11 of that act is as follows:

"A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, ⁵⁶⁰ or, if within that time such person applies for a discharge, then until the question of such discharge is determined. The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt. A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him. Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed."

Under the definitions contained in the statute this language includes persons who have filed voluntary petitions, and applies to all claims provable in bankruptcy from which a discharge in bankruptcy would be a release, and the court which may order the trustee of the bankrupt estate to enter his appearance in and to defend any suit pending against the bankrupt is the court of the United States having jurisdiction of the bankruptcy: U. S. Stats. 1898, sec. 1.

The construction of the provisions quoted for which the defendants contend is that they are peremptory, and compel the court in which a suit is pending against a bankrupt at the time of the adjudication to stay further proceedings for twelve months, or until the question of discharge is determined. A strong argument against this construction is found in the use of the words "shall be stayed until after an adjudication," and the words "such action may be further stayed," which follow. The provision that a suit pending against the bankrupt at the time of the filing of the petition shall be stayed until after adjudication or dismissal is in terms peremptory. If in case of an adjudication Congress had intended that a further stay should be peremptory also, the continued use of the word "shall" would have made its meaning clear, and the use of the

word "may," ordinarily used as a word of permission rather than of command, is significant.

As against the argument drawn from this use of the word "may," it is to be noticed that the second clause of the section, "The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt," implies that all ⁵⁶¹ suits pending against the bankrupt may be defended by the trustee of his estate, if he shall be ordered to enter his appearance and defend by the United States court, and that, unless all suits must be further stayed after the adjudication, they may be determined against the bankrupt after the adjudication, and before there is a trustee who can appear and defend. But the fact that a trustee may be ordered to appear and defend assumes that the prosecution of the suit may go on after the adjudication and before the question of a discharge is settled. It is contended that, unless after adjudication a further stay is imperative, the creditor may merge his claim into a judgment, which, being entered after the adjudication, is not provable in the bankruptcy, and from which the bankrupt will not be released by a discharge. But by section 63 claims are provable which are founded on provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge.

In order to release property which has been attached, or to prosecute an appeal or procure a review of questions at first decided against a defendant, he must often secure the plaintiff's demand by the individual undertaking of some third person. One provision of the law in question covers such cases, providing that: "Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part, he shall be subrogated to that extent to the rights of the creditor": U. S. Stats. 1898, sec. 57.

The natural meaning of the concluding part of the clause is that the person by whose individual undertaking the creditor's claim is secured shall have a right in the dividend on account of that claim proportionate to the part of his own undertaking which he has discharged. If this clause is to have operation in every instance in which a creditor's claim is secured by the individual undertaking of a third person, the creditor must not have power, between the time of the commencement of the bankruptcy proceedings and the time when claims may be

proved, to so deal with a claim that it cannot be proved, and thereby to deprive the surety of his right. It is urged that unless the further stay ⁵⁶² of proceedings is peremptory after the adjudication as well as before, the creditor, by merging his provable claim into a general judgment entered after the adjudication, may prevent the surety from exercising his right. If the original claim no longer exists, it is contended that the surety cannot prove it, and that the judgment cannot be proved because it accrues after the bankruptcy proceedings are commenced. But the provision already referred to allowing proof of judgments entered after the adjudication upon provable debts deprives these contentions of weight.

An argument may, perhaps, be drawn from the provisions of the act relating to liens. It is provided "that all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien, shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien, shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid": U. S. Stats. 1898, sec. 67.

In the case of a collusive suit against the bankrupt, in which there is an attachment of his land subsequently conveyed in fraud of his creditors, the suit pending at the time of the filing of the petition, if there is no peremptory stay of the suit after the adjudication, the colluding plaintiff may defeat the attachment by entering a discontinuance in his suit, and thus prevent the preservation of the attachment for the benefit of the estate. But the trustee of the bankrupt can avail himself of the collusive attachment only by a further prosecution of the suit in which it was made.

The considerations noticed do not seem to us to require the adoption of the construction for which the defendants contend. Congress was legislating upon a subject as to which its power is unquestionable. Successive bankruptcy acts had been in turn enacted and repealed. Numerous state insolvency laws had ⁵⁶³ been in force in the intervals when no bankruptcy act had

been in force. Under the last previous bankruptcy act, no suit or proceeding upon a provable debt could be prosecuted against the bankrupt until the question of his discharge should have been determined, and any such suit or proceeding must, upon his application, be stayed to await the determination of the bankruptcy court on the question of the discharge, unless there was unreasonable delay on his part: U. S. Stats. 1867, sec. 21; U. S. Rev. Stats., sec. 5106; *Ray v. Wight*, 119 Mass. 426, 20 Am. Rep. 333; *Hill v. Harding*, 107 U. S. 631. This requirement of a stay, if asked for by the debtor, might well operate to inflict upon creditors such serious delay in enforcing their rights against other persons than the bankrupt as is shown in the case last cited, where for several years the creditor could not place himself in a position to resort to his admitted security: See *Hill v. Harding*, 130 U. S. 699.

Congress chose the language of the present statute in view of that of the former bankruptcy act, and of the decisions under it, and of its practical operation. If the power of the bankrupt to force a stay for twelve months, or until the question of his discharge should be settled, of all suits pending against him at the initiation of the bankruptcy proceedings, was a feature which Congress wished to place in the new act, it need choose no ambiguous language. If it wished to make a different provision, and thought it more reasonable to provide for a peremptory stay, without any request therefor, in all cases until the question of an adjudication or the dismissal of the petition was determined, and to leave the question of any further stay to the determination of the court in which the action was pending, no more apt words could have been used than those which Congress has adopted. We see no good reason to give them in the enactment now in question any other than their usual meaning, and we hold that the court in which a suit against a bankrupt is pending is not, after the adjudication of bankruptcy, bound to stay proceedings further therein, while it may do so if, and to such an extent as, justice may require. The action is not absolutely barred, and the court has power to proceed to judgment: *Holland v. Martin*, 123 Mass. 278.

The defendant's bill of exceptions may, perhaps, be said to be ~~564~~ intended to raise only the question which we have decided. But the court below had power to grant a further stay of proceedings, and the defendants argue upon their brief that justice required such a further stay for two reasons; first, because the cause of action not having been put into a judgment when the

bankruptcy proceedings were begun, it must be, if proved at all, assessed and ascertained in bankruptcy, in the usual method of proof, unless, under the order of the bankruptcy court, it should be liquidated in some other manner, or unless it should be wholly defeated in a defense of the suit undertaken by the trustee by order of the same court. The second reason urged is that the course pursued will prevent the surety upon the bond to dissolve the attachment from proving the claim in bankruptcy and being thereupon subrogated to the right of the plaintiff to a dividend out of the bankrupt estate.

Assuming, without so deciding, that the question whether justice required the court below to grant a further stay after the adjudication is open, we are of opinion that no injustice was done by entering the special judgment upon the verdict.

It is to be noted that the questions whether the plaintiff had a good cause of action, and the amount of his damages recoverable of the defendants because of that cause of action, had been settled in favor of the plaintiff and against the defendants, and their sureties upon the bond to dissolve the attachment, by the verdict of a jury, in a trial in which no exceptions had been saved, and that a new trial, application for which had been made by motion to the court, had been denied. All this had been done before the commencement of the bankruptcy proceedings. The right of the plaintiff to recover of the defendants a definite amount of damages and his legal costs had thus been fixed by a legal jury, and could not be otherwise re-examined in any court of the United States than according to the rules of the common law: U. S. Const., Amendments, art. 7. Therefore, the fact of the defendants' liability and its amount could not be re-examined in the bankruptcy court. That would not be a re-examination according to the rules of the common law. Nor could those facts be re-examined as of course in the court in which the action was pending, if the trustee came in, under an order of the bankruptcy court. In the circumstances of the case, no ⁵⁶⁵ appeal lay from the court in which the suit was pending to any other court, and all common-law methods of examining the questions of the defendants' liability and its amount had been already exhausted or waived, unless it may have been a motion on account of newly discovered evidence or a writ of error, or of review.

No harm is shown to have been done to the bankrupts or to their sureties or to their creditors by way of forestalling an assessment of the bankrupts' liability to the plaintiff at a less

amount than that already fixed by the verdict. It is not suggested that there was ground for asking a new trial on account of newly discovered evidence, or for a writ of error or review.

Nor could the entry of a special judgment to enable the plaintiff to proceed against the sureties to the bond to dissolve the attachment give the plaintiff power to proceed against the person or the property of the bankrupts in case they procured a discharge in bankruptcy. The provisions authorizing a special judgment are found in Public Statutes, chapter 171, sections 23, 24, and in Statutes of 1885, chapter 59, as amended by Statutes of 1892, chapter 209. Such a special judgment is to be enforced in the first instance only against the sureties on the bond, and even if that remedy is insufficient no enforcement of the judgment can be had against the person or the property of the bankrupt unless he is refused or unreasonably delays to prosecute his application for a discharge in bankruptcy. Nor, in our opinion, would the entry of such a special judgment affect the right of the surety upon the bond to dissolve the attachment, to prove the claim in bankruptcy in the name of the plaintiff, and to be subrogated to the plaintiff's right to a dividend. Those rights are given to the surety in these words: "Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part, he shall be subrogated to that extent to the rights of the creditor": U. S. Stats. 1898, sec. 57.

The surety's rights under this clause are fixed as of the time of the commencement of the bankruptcy proceedings. All that is required to enable him to prove a claim then secured by his ~~566~~ individual undertaking is that the creditor shall fail to prove the claim. If the entry of the special judgment works any merger of the original cause of action as between the plaintiff and the bankrupt, such a merger could not justly prejudice or annul the right of the surety under the language quoted, to prove the claim as it existed at the commencement of the bankruptcy proceedings, when his own rights were fixed. The general purpose of bankruptcy proceedings is to make a ratable and just division of the debtor's estate among those entitled at the commencement of the proceedings to share in its distribution.

The surety who had paid has a just right to share, if for any reason the creditor whose claim he has secured does not share in respect to the debt, and the special judgment cannot have any

effect to make the surety's right to a dividend unjust either to the bankrupt or to the other creditors.

In the view which we have taken we find it unnecessary to consider whether the plaintiff's cause of action was a provable claim under the bankruptcy law, or whether, if provable, it would be affected by the defendant's discharge in bankruptcy: See U. S. Stats. 1898, secs. 17, 63.

The construction which we give to the statute is entirely consistent with the spirit of the bankruptcy law as shown in the provision that "the liability of a person who is a codebtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt": U. S. Stats. 1898, sec. 16. In our opinion it was not the intention of Congress unnecessarily to interfere in any way with the remedies of the creditor against other persons responsible to him than the bankrupt himself.

Exceptions overruled.

BANKRUPTCY—ACTION PENDING IN STATE COURT.—

The jurisdiction of a state court is not divested by bankruptcy proceedings: See the monographic note to *Clark v. Rowling*, 53 Am. Dec. 297. And a discharge in bankruptcy does not affect a judgment of a state court against the bankrupt, obtained after the adjudication of bankruptcy, in an action pending at the time of the adjudication, and not stayed: *Bowen v. Elchel*, 91 Ind. 22, 46 Am. Rep. 574. See, further, *Ray v. Wight*, 119 Mass. 426, 20 Am. Rep. 838.

CASES
IN THE
SUPREME COURT
OF
MISSISSIPPI

RAMSEY v. BROWN.

[77 Mississippi, 124.]

CONTRACTS—ENTIRETY.—If an employer makes a contract to pay a certain sum for a season's labor, and at the end of the first month pays for that month's services, he is estopped, when sued for the second month's wages, to assert that the contract is entire, and that he is not to pay for services until those for the whole season are rendered.

Shannon & Street and F. Johnston, for the appellant.

Hardy & Howell, for the appellees.

¹²⁵ **TERRAL, J.** W. A. Ramsey, a cotton buyer at Ellisville, Mississippi, claiming that W. P. Brown & Co., of New Orleans, Louisiana, were indebted to him for services as a cotton buyer for one and a half month's wages, and for other sums of money aggregating one hundred and ninety-six dollars and fifty cents, sued them for that sum in attachment, and the case by appeal from the justice court was tried in the circuit court of Jones county. Upon the trial in the circuit court the following was shown to be the written contract between the parties:

"This is to show that W. P. Brown & Co., of New Orleans, have this day employed W. A. Ramsey on the following terms for the cotton season of 1897-98, said season to begin September 1st, 1897, and to last until May 1st, 1898. Said W. P. ¹²⁶ Brown & Co. agree to pay said W. A. Ramsey \$800 for the season, and they reserve the right to dispense with the service

of said W. A. Ramsey at any time they find he is not conducting the business in a proper manner, and in accordance with the instructions he received from them.

“W. P. BROWN & CO.

“W. A. RAMSEY.”

The plaintiff testified that he duly entered and continued in the service of the defendants until the 15th of November, 1897, when, in consequence of the neglect of the defendants to honor his drafts upon them, he quitted their employ, and sued out the attachment in this case; that on the 9th of October defendants paid him one hundred dollars for his September salary or wages, and he also was then paid by them twenty-eight dollars and twenty cents for expense account and for hire of a servant for one month, that he did them the best service in his power from the first of September, 1897, to the middle of November, 1897, when he relinquished the job in consequence of the refusal or neglect of the defendants promptly to honor his drafts on them for the cotton bought on their account, and which tended to destroy his business. A jury being waived, the case was tried by the court, and the plaintiff was denied any relief.

Whether the contract was an entire contract, so that the plaintiff was not entitled to anything unless he served the defendants the entire eight months, was determined, we think, by the construction which the parties themselves put upon the contract; the payment to the plaintiff by the defendants of the one hundred dollars, September wages, on the 9th of October was an expression of the understanding of the parties that the wages should be paid monthly.

The defendants did not resist a recovery because of a set-off arising to them by reason of damages for quitting their service, but rested their defense upon the indivisibility of the contract; and according to the dealing of the defendants with the plaintiff, we think this contention cannot be supported.

¹²⁷ The plaintiff, we think, had good ground to demand a month's wages, and something for servant hire, and should have recovered to that extent, according to the evidence before the court.

Reversed and remanded.

ON THE ENTIRETY OF CONTRACTS for personal services and the recovery thereon without complete performance, see the monographic notes to Huyett etc. Co. v. Chicago Edison Co., 59 Am. St. Rep. 289-291; Hayward v. Leonard, 19 Am. Dec. 272-282.

MILLS v. UNION CENTRAL LIFE INSURANCE CO.

[77 Mississippi, 327.]

AGENCY—TERMINATION BY DEATH.—A contract of agency for a term of years between an insurance company and its agent for the payment of certain agreed commissions on premiums paid on policies procured to be issued by such agent, is terminated by his death, and his legal representative cannot recover for commissions on premiums paid on such policies after the agent's death and within the period of service contracted for.

McWillie & Thompson, for the appellant.

Calhoon & Green, for the appellee.

328 WOODS, C. J. The appellant exhibited his bill in the chancery court of Hinds county, by which he sought an accounting with the defendant respecting commissions on all premiums collected since the death of his intestate on policies procured for the defendant company by the intestate during his lifetime, and praying for a decree for payment of such commissions. The complainant affirmed his ability and willingness to discharge the duties appertaining to the contract of employment of his intestate with the defendant company. To this bill a demurrer was filed, and the same having been by the chancery court sustained, an appeal was taken to this court.

In the month of February, 1896, appellant's intestate, W. H. Tegarden, and the defendant life insurance company entered into a contract, by the terms of which Tegarden became the general agent of the company in a district embracing about one-half of the state of Mississippi. This contract was to continue for the period of twenty years, unless sooner terminated in one of the modes specified therein. Tegarden died after serving the company as such general agent about a year and a half, and the company settled all demands or claims arising under the contract up to the date of his death, and this suit is for the recovery of commissions on premiums collected by the company since such death.

On the oral argument, the learned counsel for appellant candidly and properly declined to press the view that Tegarden's administrator had any legal right to assume the performance of the duties of the agency imposed upon Tegarden by the terms of the contract, and no further reference need be made by us to that portion of the complaint.

The duties assumed by Tegarden, under the contract, were important and multiplied, and unquestionably Tegarden was

³³⁷ intrusted with the performance of these duties during the long term of twenty years because of his integrity, ability, and skill in this branch of professional work. He was required to keep an office in the city of Jackson, and to keep, or have kept, books necessary and proper in such business; he was to canvass for applications for insurance, and to collect and pay over to his principal premiums on insurance effected by his procurement; he was to act exclusively for the company, and to devote his entire time to the business of his agency; he was to appoint subagents to canvass for applications for policies, and for the fidelity and honesty of such subagents he was to be held responsible.

The compensation of Tegarden was to be made by payment of certain agreed commissions on premiums paid on policies procured to be issued by Tegarden's agency. These commissions were liberal, ranging from fifty per centum on the first year's premiums to seven and one-half per centum on subsequent years' premiums during the continuance of the contract.

Was the contract of agency terminated by the death of the agent? By that great event, which comes to all of us only once, the agent was cut off from the dedication of his entire time to the building up and extending the business of his principal, and the valuable services which he had bound himself to perform for his principal for the period of twenty years became impossible of rendition. The consideration for his compensation was his entire time, and his skill and ability in his chosen profession, in all the stipulated labors to be performed by him during the long period named. His services were to be rendered continuously during the whole period, unless the contract should be sooner ended, and his compensation was for such entire and continuous service, and not for any specific act or separable piece of work.

Death put an end to the agency, and to the contract of agency, and the company having fully paid for the services rendered by the agent up to the date of his death, the claim of his personal ³³⁸ representative for commissions yet to accrue for eighteen years after the death of the intestate is without merit.

Affirmed.

AGENCY—DEATH OF COAGENT.—Where a firm are employed as insurance agents, their authority is determined by the death of one partner: *Martine v. International Life Ins. Soc.*, 53 N. Y. 339, 13 Am. Rep. 529.

**LIVERPOOL AND LONDON AND GLOBE INSURANCE
COMPANY v. COCHRAN.**

[77 Mississippi, 348.]

INSURANCE, FIRE—MISSTATEMENT AS TO OWNERSHIP.—If the owner of an undivided one-half interest in a building states in his written application for fire insurance that he is the sole and unconditional owner of the building, the insurance is void, although such applicant is sincere in making such misstatement, as his co-owner had verbally promised to convey to him upon the payment of a certain sum.

Miller & Baskin, for the appellant.

Cochran & Bozeman, for the appellee.

WOODS, C. J. That the insured were not the unconditional and sole owners of the property when the application for insurance was made, and the policy of insurance was issued, is perfectly plain on the evidence offered by the plaintiff himself. They were the owners of an undivided half interest in the property, and they had neither the legal nor equitable title to the other undivided half interest.

Whatever opinion the person who made the application may have sincerely entertained, the verbal agreement, whereby the owners of the other undivided half interest undertook to convey their interest to their other two co-owners on repayment by the latter to the former of whatever sums had been paid by the former to their vendors, conferred no title, legal or equitable, the conditional agreement never having been executed by the parties to it beyond the mere cessation of the co-owners to use and occupy the property.

While it is true that in construing contracts of this character, courts will not scrutinize with critical nicety the mere question of title, yet where it clearly and indisputably appears that the insured owned only an undivided half interest in the property sought to be insured, while in their application for insurance it was stated by them that they were the sole and unconditional owners of the property, courts will not, and cannot, shut their eyes to so glaring a misstatement of an essential fact, however sincerely made.

Entertaining this opinion on this point, we think it unnecessary to go further into the case. The verdict should have been for the defendants, as no other could have properly been allowed to stand on the transcript before us. The court, there-

fore, might and should have given a peremptory charge for the defendant, if the same had been asked.

Reversed and remanded.

INSURANCE, FIRE.—AN INTEREST, to be unconditional and sole, must be completely vested in the insured, not contingent or conditional, nor for others, nor for life only, nor in common: *Hartford Fire Ins. Co. v. Keating*, 86 Md. 130, 63 Am. St. Rep. 490.

HODGES v. CAUSEY.

[77 Mississippi, 353.]

DOGS—TRESPASSING—RIGHT TO KILL.—The fact that a dog is trespassing does not justify his wanton or malicious destruction, even after his owner has had notice to keep him off the premises.

DOGS—RECOVERY FOR KILLING—PROOF OF VALUE. The owner of a dog wrongfully killed may maintain an action to recover therefor, and is not compelled to prove his market value. If the dog has no market value, his owner may prove and recover his special value to him by showing the pedigree, characteristics, and qualities of the dog, and then proving by witnesses who know these things their opinion of his value.

W. S. and W. R. Chapman, for the appellant.

F. Johnston and T. R. Baird, for the appellee.

356 WHITFIELD, J. It may be that "property in dogs is of an imperfect or qualified nature," as held in *Sentell v. New Orleans etc. R. R. Co.*, 166 U. S. 698, *Ward v. State*, 48 Ala. 161, 17 Am. Rep. 31, *Wilton v. Weston*, 48 Conn. 325, and *Carthage v. Rhodes*, 101 Mo. 175. And it is doubtless true that much of the conflict of decision touching this subject is due to the varying statutes of different states as regards their being the subject of larceny, etc. But it is very correctly said in the learned note to *Hamby v. Samson*, 67 Am. St. Rep. 297, that "in the United States there has been a quite noticeable tendency in legislation and judicial decisions to recognize a complete property in dogs." When the right to kill a trespassing dog is in question, doubtless the difference in nature and instincts between the dog and ordinary domestic animals, as the horse or cow, may properly enter into its solution. It is said in the exhaustive note to this same case of *Hamby v. Samson*, 40 L. R. Ann. 510, that "it is generally held that a

merely trespassing dog cannot be killed," and the authorities pro and con are cited. In that note, and also in the note to *Tonawanda R. R. Co. v. Munger*, 49 ³⁵⁷ Am. Dec. 260, illustrations are given of the conditions under which it would be lawful to kill a trespassing dog: Sheepkilling dogs may be killed; dogs destroying deer, fowls, or other animals, where necessary to their preservation; howling dogs on one's premises may be killed, etc. But it is said the dog must be killed at the time, and not on account of past damage done by him: *Tonawanda R. R. Co. v. Munger*, 49 Am. Dec. 260, and authorities. The true rule is thus stated in the note to *Hamby v. Samson*, 67 Am. St. Rep. 294, 295: "But one is never justified in going to excessive lengths in the defense of himself or his property from assault or injury. The method of defense adopted must bear a certain relation to the character or seriousness of the threatened injury. The fact that a dog is trespassing does not justify his wanton or malicious destruction." And again: "In any case the question whether the defendant was justified in killing or injuring the plaintiff's dog should be submitted to the jury, to be decided from a consideration of the peculiar facts and circumstances of the case." The court virtually told the jury, in its modifications of plaintiff's instructions, that, "if they believed defendant had warned plaintiff not to let his dogs run in his field," defendant was not liable. This was error. Notice to keep his dogs out was one fact, but not the only fact, to be considered. Notice of that sort is not conclusive: See authorities collected in paragraph 3, *Tonawanda R. R. Co. v. Munger*, 49 Am. Dec. 259. When it is borne in mind of what great value some dogs are, the reasonableness of the general rule against the right to kill a mere trespassing dog is apparent: See *Mullaly v. People*, 86 N. Y. 365, and note; 40 L. R. Ann. 510. Here, at the time this English deerhound was killed, she was running through the corn rows in November, when the corn was thoroughly matured. She had done at that time no damage to the cotton. The defendant says he killed her to prevent her doing damage by knocking out cotton from the stalks. The jury should not have been told that notice was a perfect defense. All the circumstances in evidence were before them, and the reasonableness of the alleged necessity of ³⁵⁸ killing the dog to save property should have been left to them, as a question of fact, under proper instructions as to the law.

The court also erred in its instruction as to the necessity of proving market value. The doctrine supported by reason and the authorities is that you may prove the market value if the dog has any, and, if not, then his "special or pecuniary value to his owner, to be ascertained by reference to his usefulness and services": *Heiligmann v. Rose*, 81 Tex. 222, 26 Am. St. Rep. 804. And it is perfectly competent to prove the pedigree, characteristics, and qualities of the dog, and then prove, by witnesses who know these things, their opinions as to the value: *Bowers v. Horen*, 93 Mich. 420, 32 Am. St. Rep. 513. And on both these propositions see, specially, the notes to *Hamby v. Samson*, 67 Am. St. Rep. 292, 293, with the authorities, and the other in 40 L. R. Ann. 515, 518 (8), et seq.

Judgment reversed, verdict set aside, and cause remanded for a new trial.

DOGS—RECOVERY FOR KILLING.—The basis of recovery for killing a dog may be either the market value, if the animal has any, or some special or pecuniary value to the owner that may be ascertained by reference to the usefulness or services of the dog. Those acquainted with the characteristics and qualities of a dog may testify as to his value: See the monographic note to *Hamby v. Samson*, 67 Am. St. Rep. 292, 293; and evidence of his pedigree is competent to prove his value: *Citizens' Rapid Transit Co. v. Dew*, 100 Tenn. 317, 66 Am. St. Rep. 754.

THE FACT THAT A DOG IS TRESPASSING does not justify his wanton or malicious killing: See the monographic note to *Hamby v. Samson*, 67 Am. St. Rep. 294.

JAMES v. STATE.

[77 Mississippi, 370.]

BURGLARY—LARCENY—AVERMENT OF OWNERSHIP.—Under an indictment charging burglary with larceny, the averment of ownership in the part of the indictment charging the larceny is surplusage after conviction of the burglary, and may be rejected.

BURGLARY—PROOF OF OWNERSHIP AND CORPORATE EXISTENCE.—Under an indictment for burglary, it is necessary to aver and prove the ownership of the premises burglarized. If it is averred to be the property of a corporation, as a railway car, the corporate existence must be proved.

CRIMINAL LAW—APPELLATE PRACTICE.—A judgment of conviction cannot be reversed in the supreme court, for errors not specifically objected to in the trial court.

Indictment charging the breaking and entering of a railway car, the property of the Illinois Central Railroad Company, a corporation, with intent to steal the personal property of such corporation, and further charging the stealing from such car of a number of pairs of shoes, the property of the Hamilton-Brown Shoe Company, a corporation. Judgment of conviction and the defendants appealed.

J. H. Wynn and C. J. Jones, for the appellants.

W. N. Nash, attorney general, for the appellee.

³⁷¹ WHITFIELD, J. We have seldom had before us a more unintelligible record. ³⁷² So far as Edward Olark is concerned, it is sufficient to say that the conviction is utterly unwarranted by the testimony. As to Allen James, we notice the contentions of learned counsel for the appellant, as follows: When the indictment charges burglary with larceny, the averment of ownership in the part charging the larceny is surplusage, and may be rejected. The precise point is decided in *Brown v. State*, 72 Miss. 990, and also in *Harris v. State*, 61 Miss. 304. The principle is stated in *Tyler v. State*, 69 Miss. 397: "Where the entire averment of which the descriptive matter is a part is surplusage, it may be rejected, and the descriptive averment need not be proved. But it must be proved as charged wherever, if the person, thing, act, place, or time to which it refers was struck from the indictment, no offense would be charged": 1 Bishop's New Criminal Procedure, sec. 485. Of course, we are speaking of a case where, as here, the general verdict of guilty as charged is a conviction of the principal offense alone, as held in *Roberts v. State*, 55 Miss. 421, 424. If the averment that the shoes were the property of the Hamilton-Brown Shoe Company were stricken out, the burglary with intent to steal would be well charged: *Brown v. State*, 72 Miss. 990. The cases of *Mobley v. State*, 46 Miss. 501 (attempt to commit a rape), *John v. State*, 24 Miss. 575 (murder), *Dick v. State*, 30 Miss. 631 (attempt to commit a rape), and *Tyler v. State*, 69 Miss. 395 (unlawful sale of intoxicants), are not in point. It is certainly settled that it is necessary to allege the ownership of the building burglarized, and to prove it as laid: 3 Ency. of Pl. & Pr. 758, notes 3, 4; 2 Bishop's New Criminal Procedure, sec. 137. And when a corporation is alleged to be the owner, there must be proof of the existence of the corporation: 2 Bishop's New Criminal Procedure, sec. 138.

Johnson v. State, 73 Ala. 483, 486, Berry v. State, 92 Ga. 47, and Norton v. State, 74 Ind. 338, are directly in point. Mr. Bishop says (2 Bishop's New Criminal Procedure, 71) that "the de facto character of the corporation only need be shown in evidence," ~~and~~ citing authorities. And it is said in Norton v. State, 74 Ind. 338, that it is enough to prove that "the railroad company was known and acting as a corporation." But there is absolutely no testimony whatever in this record as to the existence of the corporation, the Illinois Central Railroad Company, not chartered in this state; and this failure of proof would be fatal if the error had been availed of specifically in the court below. Section 4370 of the code of 1892 required this to be done, and its not having been done forbids a reversal on that ground: Lea v. State, 64 Miss. 201. See the authorities collected in Brame & A. (Miss.) Dig. 1094-1097. The appellant must specify in the court below the error of which he complains. Had that been done in this case, the proof could have been instantly supplied. The verdict is supported by the evidence as to Allen James, and we find, as to him, no reversible error.

As to Edward Clark, the judgment is reversed, the verdict set aside, and the cause remanded for a new trial. As to Allen James, the judgment is affirmed.

BURGLARY.—AN INDICTMENT for burglary upon the premises of a corporation must allege the ownership of the premises to be in the corporation, and must aver the corporate name and character of the owner: Aldridge v. State, 88 Ala. 113, 16 Am. St. Rep. 23.

ON INDICTMENTS CHARGING BURGLARY with larceny, see the monographic note to Ben v. State, 58 Am. Dec. 245, 246; Breese v. State, 12 Ohio St. 146, 80 Am. Dec. 840.

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JACKSON BANK v. WILLIAMS.

[77 Mississippi, 398.]

INSURANCE, LIFE — BENEFICIARY — OWNERSHIP OF POLICY—POWER TO TRANSFER.—A life insurance policy, and the money to become due upon it, belong, the moment it is issued, without delivery, to the person named therein as beneficiary; and there is no power in the person procuring the insurance, by any act of his, by deed or will, to transfer to any other person the interest of the beneficiary without the latter's consent. The beneficiary designated in the policy is the proper person to receipt and sue for the insurance money.

Calhoon & Green, for the appellants.

Williamson, Wells & Croom, for the appellee.

⁴⁰² **TERRAL, J.** The policy of life insurance issued by the Equitable Life Association of the United States upon the life of Charles D. Williams, payable to his wife, Lula B. Williams, became, upon its delivery to the insured, a vested interest in the wife, and such interest was thereafter irrevocable by the assured except with the consent of the beneficiary. The express terms of the contract as written in the policy make the proceeds of it payable to the wife, and this gives her in law the absolute title to the policy, and she alone could sue upon it in a court of law; and there could be no remedy upon it in equity for any supposed interest of the insured or of his assignee, for no such interest could be acquired except with the consent of the beneficiary.

If by the common law no vested interest in contracts like the present passed to the beneficiary until the policy came to his possession, still section 1964 of the code of 1892 (Code 1880, sec. 1261), providing that the proceeds of a life insurance policy shall inure to the party therein named as beneficiary, would, in contracts like this, vest an absolute and indefeasible interest in the wife from the time of the issuance of the policy.

Bliss on Life Insurance says: "If the policy, when issued, expressly designates a person as entitled to receive the insurance money, such designation is conclusive, unless some question arises as to the rights of creditors of the person who paid the premiums and procured the insurance. The receipt of the designated person will discharge the company, and he will be entitled to maintain an action. It is the general rule that a policy, and the money to become due under it, belong, the moment it is issued, to the person or persons named as bene-

ficiary or beneficiaries, and there is no power in the person procuring the insurance, by any act of his, by deed or will, to transfer to any other person the interest of the person named. The person designated in the policy is the proper person to receipt for and to sue for the money": Bliss on Life Insurance, 1st ed., secs. 316, 317. And in section 339 the author further says: ⁴⁰³ "Where the policy designates a person to whom the insurance money is to be paid, the person who procures the insurance, and who continues to pay the premiums, has no authority, by will or deed, to change the designation or title to the money. He is under no obligation to continue to pay the premiums, unless he has covenanted so to do, but if he does so, the person originally designated in the policy will derive the benefit. The change of designation can only be made by the person originally designated, and therefore all of such persons must concur in the change."

The same principles are maintained in other authorities: Cook on Life Insurance, sec. 74, note; 2 Joyce on Insurance, sec. 730; Central Bank v. Hume, 128 U. S. 206; Harley v. Heist, 86 Ind. 196, 44 Am. Rep. 285; Hooker v. Sugg, 102 N. C. 115, 11 Am. St. Rep. 717; Griffith v. New York etc. Ins. Co., 101 Cal. 627, 40 Am. St. Rep. 96; In re Dobbel, 104 Cal. 432, 43 Am. St. Rep. 123; Garner v. Germania Life Ins. Co., 110 N. Y. 266.

Other cases cited by the learned counsel of appellant contravene the principles herein announced, but we think the authorities followed by us contain the better and sounder view of the subject.

The judgment of the circuit court is affirmed.

INSURANCE, LIFE—RIGHTS OF BENEFICIARY.—A life insurance policy, and the money to become due under it, belong, the moment it is issued, to the beneficiary, and the insured has no power by any act of his by deed or will to transfer to any other person the interest of the beneficiary: Note to Ricker v. Charter Oak Life Ins. Co., 38 Am. Rep. 293. See, also, Griffith v. New York Life Ins. Co., 101 Cal. 627, 40 Am. St. Rep. 96; In re Dobbel, 104 Cal. 432, 43 Am. St. Rep. 123.

EX PARTE BRIDGFORTH.

[77 Mississippi, 418.]

CONSTITUTIONAL LAW—IMPRISONMENT FOR DEBT—BASTARDY PROCEEDINGS.—A judgment in bastardy proceedings that the father of an illegitimate child be required to maintain or support it, and in default thereof be committed to jail, is in the nature of a penalty and in no sense a judgment for debt within a constitutional prohibition against imprisonment for debt.

Judgment in a bastardy proceeding that the defendant should give bond for the payment of a certain sum of money for the support of his illegitimate child, and in default thereof be committed to jail. Defendant failed to give the bond required and was committed. He then applied for a writ of habeas corpus, and, failing to obtain his release in the lower court, appealed.

R. L. Dabney and Wall & Morgan, for the appellant.

W. N. Nash, attorney general, for the appellee.

419 WOODS, C. J. The sum adjudged by the court below against the appellant was not a recovery for debt arising out of any contract, express or implied. The appellant owed no debt to the mother of the child. The proceeding under our bastardy statutes is merely a police regulation by which the father of the illegitimate **420** child may be required to maintain and support his own child, and protect the public against its becoming a charge upon the county. It is in the nature of a penalty, by which the father is compelled to assist, at least, in making provision for the unfortunate infant unlawfully begotten by him, and is in no proper sense a debt in the well-understood meaning in which that word is employed in section 30 of our constitution: *Ex parte Cottrell*, 13 Neb. 193; *Lower v. Wallick*, 25 Ind. 68; *Musser v. Stewart*, 21 Ohio St. 353; *State v. Brewer*, 38 S. C. 263, 37 Am. St. Rep. 752; *In re Wheeler*, 34 Kan. 96. The only case which has been seen by us holding the contrary is that of *Holmes v. State*, 2 G. Greene, 501.

Affirmed.

BASTARDY—IMPRISONMENT FOR DEBT.—A constitutional inhibition against imprisonment for debt is not violated by the imprisonment of one who, after his conviction on a charge of bastardy, has failed to pay the penalty imposed: *State v. Brewer*, 38 S. C. 263, 37 Am. St. Rep. 752, and monographic note.

ARNOLD v. STATE.

[77 Mississippi, 463.]

OFFICERS—LIABILITY FOR STOLEN FUNDS.—Public officers are liable on their official bonds for the absolute safety of all money coming into their hands by virtue of their office, unless it is lost by the act of God or the public enemy. They are liable for its theft by a third person, and it is no defense that it was stolen without the officer's fault.

W. H. Clifton, for the appellants.

M. McClurg, attorney general, and J. W. Barron, district attorney, for the appellee.

468 **TERRAL, J.** The defendant, Arnold, with his sureties, was sued on his official bond as county treasurer of Itawamba county, for about three thousand dollars.

It is admitted that the county treasurer's safe, which was furnished to him by public authority for the safekeeping of the public moneys and in which he kept the county funds, was broken open by thieves and two thousand eight hundred and ninety-seven dollars and thirty-two cents stolen therefrom. The plaintiff, suing for the use of Itawamba county, had judgment. Of this judgment the defendant, Arnold, complains, and insists that he is not liable for the money so stolen because it was admittedly lost without any negligence on his part.

We regard the rule as settled in this state that public officers are liable on their official bonds for the absolute safety of all moneys coming into their hands, unless when it is lost by the act of God or the public enemy. It was so ruled by this court in the case of a tax collector's bond in *State v. Lee*, 72 Miss. 281. The condition of the bond of a tax collector and of a treasurer is the same, being prescribed by section 3055 of the code of 1892, and the construction put upon one character of bond must apply to and govern the construction of the other. It would be an anomaly to hold that the condition of the tax collector's bond renders the tax collector liable for all losses arising from thefts, robberies, and other like causes, and yet upon the same condition, when found in a treasurer's bond, to hold the treasurer not liable for losses arising from like causes.

In *Griffin v. Board of Levee Commrs.*, 71 Miss. 767, a defense somewhat similar to that set up in this case appeared to the court to be so frivolous that it was not dignified with a discussion of the question.

The opinion that officers are liable on their official bonds for all moneys coming into their hands and lost by them, except ~~400~~ by the act of God or of the public enemy, has been so universal and so fixed in the judicial, professional, and legislative mind, that prior to the adoption of the constitution of 1890 the legislature has often given relief to officers for the loss of the public moneys by thefts and robberies. Chapter 548 of the Laws of 1884, relieved County Treasurer Wainright of liability for three thousand four hundred and forty-four dollars and eight cents, of which the safe in which he kept the funds of his county was feloniously and burglariously taken and stolen, and many similar acts of the legislature may be found among our statute laws. These acts voice the public judgment in the several branches of government that the legislature only could heretofore give relief in such cases. The constitution of 1890, section 100, forbids the legislature to grant any relief to public officers for losses occasioned by such causes. Though in other states a different rule of law obtains upon this subject, yet we are not disposed to depart from the rule that has always prevailed here. And if we may indulge a hope for the advantage of future times, esto perpetua.

The judgment of the circuit court is affirmed.

OFFICERS—LIABILITY FOR STOLEN FUNDS.—The liability of public officers intrusted with public funds is fixed by their bonds, and the fact that money is stolen from them, without fault upon their part, does not release them from liability thereon: *State v. Nevin*, 19 Nev. 162. 3 Am. St. Rep. 873. See, further, the monographic note to *State v. Harper*, 67 Am. Dec. 865-872.

KENT v. YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY.

[77 Mississippi, 494.]

MASTER AND SERVANT—DEFECTIVE TOOLS.—An employé cannot recover for injury resulting from a defect in a tool used by him in the customary manner, of a kind in general use, procured from and tested by a reputable manufacturer, and approved as sound by the employé's superintendent, as well as by the employé himself.

EVIDENCE—OPINIONS.—Evidence that an examination of a tool, after an accident and after the tool was broken, shows that it was constructed out of defective material, is inadmissible.

MASTER AND SERVANT—SAFEST APPLIANCES.—A railroad company is not negligent in failing to use the safest known appliances, if those furnished are such as are in general use, and are reasonably safe.

Cook & Alcorn, for the appellant.

Mayes & Harris, for the appellee.

⁴⁹⁷ **TERRAL, J.** Kent, the plaintiff, a section foreman of the defendant company, was furnished by the company with a cold chisel for cutting steel rails when necessary, and while some laborers were engaged in that work under his supervision a fragment of the chisel was shivered from it, which hit the plaintiff in the eye, and after great pain and suffering by him caused its loss.

The chisel was made by a reputable foundry, and was furnished to the plaintiff by the supervisor of the railroad company, who, upon inspection of it before sending it out, considered it good and sound; the plaintiff, of many years' experience in the use of cold chisels, also adjudged it to be good and sound so far as he could tell. The evidence showed that the cold chisel was the customary tool of the defendant company for cutting iron and steel rails, and that it was the usual ⁴⁹⁸ implement of other railroad companies in this country for that purpose.

The plaintiff offered to prove by one Palmer, of twenty years' experience in the track department of railroads, and by Johnson, a blacksmith of eighteen years' experience, who had examined the chisel after the accident, that the chisel was defective and dangerous; and further offered to prove by Palmer that the more modern appliance for cutting steel rails is a saw, which is not dangerous, and that it is especially used in foreign countries, which offered evidence was excluded by the court. And the court also directed a verdict for the defendant.

The proposed evidence of the witnesses Palmer and Johnson, giving their opinion of the defect in the chisel, from an inspection of it made after it was broken, was impertinent; and the rule of law that railroad companies are not bound to furnish the safest appliances, justified the court in excluding the evidence of Palmer that a saw is a safer tool for the cutting of steel rails.

The ruling of the court that the plaintiff had not made out a case by his evidence is supported by all the authorities that have fallen under notice, and especially by Richmond etc. R. R.

Co. v. Elliott, 149 U. S. 266, 271; 2 Bailey on Personal Injuries, sec. 2639; Indianapolis etc. Ry. Co. v. Toy, 91 Ill. 474, 33 Am. Rep. 57; 3 Elliott on Railroads, sec. 1278.

THE DUTY OF A MASTER TO FURNISH SAFE TOOLS and appliances is discussed in the monographic notes to Chicago etc. R. R. Co. v. Swett, 92 Am. Dec. 213-221; Buzzell v. Laconia Mfg. Co., 77 Am. Dec. 218-225; Sweeney v. Berlin etc. Co., 54 Am. Rep. 726-730; Rogers v. Ludlaw Mfg. Co., 59 Am. Rep. 75-79. A master is not an insurer of his servant's safety, but he must use reasonable care to protect him from injury arising from latent defects in appliances for the servant's work: Edward Hines Lumber Co. v. Ligas, 172 Ill. 315, 64 Am. St. Rep. 38. However, he is not bound to furnish the safest machinery and appliances: Wormell v. Maine Cent. R. R. Co., 79 Me. 397, 1 Am. St. Rep. 321. Compare Troxler v. Southern Ry. Co., 124 N. C. 189, 70 Am. St. Rep. 580.

ON OPINION EVIDENCE as to the condition of a tool in using which a servant is injured, see Johnson v. Missouri Pac. Ry. Co., 96 Mo. 340, 9 Am. St. Rep. 351.

WRIGHT v. MORDAUNT.

[77 Mississippi, 537.]

LIMITATION OF ACTIONS—CONFLICT OF LAWS.—Limitation of actions does not depend on the law of the place where the contract was made but on the law of the forum.

LIMITATION OF ACTIONS—CONFLICT OF LAWS.—The law of the state where an action is brought consisting of a six year limitation bars a suit on a note made in another state in which the period of limitation is ten years, although both parties to the note resided in such other state at the time of its execution, and the maker did not become a resident of the state where suit was brought until nearly six years after the maturity of the note.

Booth & Booth, for the appellant.

Miller, Smith & Hirsch, for the appellee.

538 CALHOON, J. The promissory note sued on was executed in Illinois, payable in Illinois, and both parties resided in that state at the time of its execution and maturity. Its date is July 1, 1892, **539** and it matured September 4, 1892. The law of Illinois does not bar actions on promissory notes until ten years have elapsed after maturity. In the spring of 1898, the maker, Mordaunt, took up his residence in Mississippi, and on June 6, 1899, he was sued on the note by the payee, Wright, and pleaded the six years' statute of limitations, and, his demurrer to Wright's replication setting up the above facts

being sustained, Wright appeals. The note was barred when the action was begun. The *lex fori* governs, and the law of this forum is that six years bar an action on a promissory note, and more than six years elapsed after maturity of this note.

The fact that this period expired in part before the maker became a citizen of this state makes no difference. It is the lapse of time, regardless of place, which bars in such cases as this. Section 2737 of the code makes six years a bar. No statute, in a case like this, makes any exception to deprive defendant of the right to invoke the lapse of time as a bar. Section 2748 of the code has no application, for it applies to a cause of action accrued in this state, and deprives an absent party of the right to avail of time expired during his absence. Section 2754 has no application, because its sole purpose and effect are to give to one sued in this state the benefit of a bar completed elsewhere.

The whole matter is statutory. A statute—Code, section 2737—makes six years a bar. No other statute applicable to the circumstances of this case creates any exception, or in any way modifies the right of the defendant to invoke the bar of six years given by the general statute. Therefore, Mr. Wright's action was barred. *Robinson v. Moore*, 76 Miss. 89, is of no benefit to appellant, because in that case the right of action accrued in this state.

Affirmed.

THE STATUTE OF LIMITATIONS OF THE FORUM must govern; hence a cause of action, not barred where it arose, may be barred by the law where it is sought to be enforced: See the monographic note to *Eingartner v. Illinois Steel Co.*, 59 Am. St. Rep. 878; *Van Stantvoord v. Roethler*, 35 Or. 250, 76 Am. St. Rep. 472.

PASCAGOULA BOOM COMPANY v. DIXON.

[77 Mississippi, 587.]

WATERS AND WATERCOURSES.—NAVIGABLE RIVERS ARE PUBLIC HIGHWAYS, subject to public use, and the right of passage over them extends to all parts of their channels, and any obstruction thereof is a public nuisance.

WATERS AND WATERCOURSES—OBSTRUCTION—INJUNCTION.—Booms for logs which prevent the speedy passage of rafts and logs down a navigable stream must have legislative warrant for their construction. Otherwise they are a nuisance, and their construction may be enjoined by a person suffering special damage.

J. L. Ford, C. H. Wood, and McWillie & Thompson, for the appellants.

¶1 TERRAL, J. The appellants, complainants below, sought a mandatory injunction against the defendants for the removal of a boom placed by them in the Pascagoula river, as a public nuisance, causing them special damage. This river is alleged in the bill and admitted in the answer to be a navigable stream for logs, rafts, and boats; and it is admitted that for the purpose of improving the navigation the national government makes an annual appropriation.

At the point on the river where the obstruction complained of is located, the defendants, J. L. Dixon & Co., are the owners of the eastern bank of the river, and have a lease of the lands on the western side of the river, and so they are, in effect, the owners, as respect to this controversy, of both banks of the river at that place.

They have erected a sawmill upon a cutoff, or dead river, which adjoins the river on the eastern side, and the dead river forms a receptacle for the safekeeping of their logs. In order to stop these logs and to convey them into this dead river, they constructed a boom across the river from the one side to the other. A part of the boom is stationary, but there is a swinging boom near the center of the stream five hundred feet long, which is usually kept open, but which may be closed in cases of necessity.

There is also a swinging boom at the eastern or southern end of it, which permits of being opened and closed at the pleasure of the defendants, and which was constructed for the purpose of passing down the stream the logs of others, which accidentally or otherwise might be stopped by the main boom.

The defendants usually kept the main swing boom open, so that a large space near the center of the stream was left open for the passage of logs and rafts down the river; but when there was a freshet in the river and there was a drive of the defendants' logs coming down the stream it was necessary, in order to stop them all, to close the boom entirely, so that no logs could pass. When the river was not too high the defendants kept the main swing boom only partly closed, and had employes stationed there to pass through all logs not their own; but in order to stop their own logs it was frequently necessary for the defendants to close the river entirely.

In some jurisdictions it is held that the riparian owner may make such erections upon his own land as his convenience or

business may require, though navigation be inconvenienced thereby, provided it be not wholly obstructed. At common law, however, a navigable river is a public highway subject to public use, and the right of passage over it extends to all parts of the channel, and any obstruction of the channel is a public nuisance: *Williams v. Wilcox*, 8 Ad. & E. 314; 35 Eng. C. L. 396-400; *Veazie* ⁵⁹³ v. *Dwinel*, 50 Me. 488; *Sherlock v. Bainbridge*, 41 Ind. 35, 13 Am. Rep. 302; *Atlee v. Packet Co.*, 21 Wall. 389; *Morgan v. Reading*, 3 Smedes & M. 366-406; *Commissioners v. Withers*, 29 Miss. 21, 37, 64 Am. Dec. 126. Section 81 of the state constitution embodies this principle of the common law as follows: "The legislature shall never authorize the permanent obstruction of any of the navigable waters of this state, but may provide for the removal of such obstructions as now exist, whenever the public welfare demands. This section shall not prevent the construction, under proper authority, of drawbridges for railroads, or other roads, nor the construction of 'booms and chutes' for logs in such manner as not to prevent the safe passage of vessels, or logs, under regulations to be provided by law."

The plain interpretation of this section of the constitution is that booms for logs which prevent the speedy passage of rafts and logs down the stream must have legislative warrant for their existence before they can be constructed. "All navigable waters are for the use of all the citizens, and there cannot lawfully be any exclusive private appropriation of any portion of them": *Cooley's Constitutional Limitations*, 5th ed., 728.

We are of the opinion that the boom of the defendants in the Pascagoula river is a public nuisance, and that the particular right of the complainants gives them a right to the remedy sought by them: *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565, 36 Am. Dec. 502.

Reversed.

NAVIGABLE STREAMS ARE PUBLIC HIGHWAYS by common right: *Farmers' etc. Co. v. Albermarle etc. R. R. Co.*, 117 N. C. 579, 53 Am. St. Rep. 606. The right of navigation in a public navigable stream is a right in every part of the space between the banks: See the monographic note to *Davis v. Winslow*, 81 Am. Dec. 582. Obstructions to floatable streams are nuisances: *Commissioners v. Catawba Lumber Co.*, 116 N. C. 731, 47 Am. St. Rep. 829. And if a public nuisance, consisting of the obstruction of a navigable river, works a private injury, the injured party may have it restrained by injunction: See the monographic note to *Davis v. Winslow*, 81 Am. Dec. 587.

WATERS—RIGHT TO FLOAT LOGS.—An individual upon whom the privilege has been conferred by statute has a right to use a navigable stream as a highway for floating logs: *Coyne v. Mississippi etc. Boom Co.*, 72 Minn. 533, 71 Am. St. Rep. 508. And, while the public right of floatage exists in streams, no easement beyond the natural one can be obtained without authority: *Koopman v. Blodgett*, 70 Mich. 610, 14 Am. St. Rep. 527.

McCARLIE v. ATKINSON.

[77 Mississippi, 594.]

LIBEL—WHERE AND WHEN PUBLISHED—LETTER SENT BY MAIL.—A libel contained in a letter written and mailed in one state to an addressee in another state is not published until such letter is received and read.

LIBEL, CONCEALMENT OF CAUSE OF ACTION—STATUTE OF LIMITATIONS.—The sending of libelous matter by mail to another state where the letter is opened and read is not a fraudulent concealment of the contents of the letter or its publication, or of the cause of action for the libel so as to take the case out of the operation of the statute of limitations.

J. B. Holden, P. Z. Jones, and J. H. Price, for the appellant.

McWillie & Thompson, for the appellee.

⁵⁹⁸ **TERRAL**, J. McCarlie sued Atkinson in the circuit court of Pike county in the sum of eighty-four thousand dollars damages for a libel in saying of him, in a letter to W. C. Hurt Tobacco Company, of Danville, Virginia, "that he [McCarlie] was not safe for a credit of one hundred and twenty-five dollars, and that he had never paid his debts"; to a plea of the statute of limitations of one year, the plaintiff replied that defendant had fraudulently concealed said cause of action until within one year before suit brought. A demurrer to said replication being sustained, the plaintiff appeals.

The libel in this case was not complete until the letter containing the matter complained of was received at Danville, Virginia, by the W. C. Hurt Tobacco Company, and was there opened and read by some member of that company. It is impossible to predicate a concealment of the publication ⁵⁹⁹ of the contents of the letter of any act of the defendant in Mississippi.

The sending of the letter to Danville through the mail was a condition without which its contents could not have been published there, but such sending of the letter by mail could not

constitute a fraudulent concealment of the contents of the letter or of the publication of such contents at Danville, Virginia. We see no ground for the contention of the appellant; the cases cited by him are not pertinent to the facts of this case.

It is said that fraud does not affect the statute of limitation in this respect: *Wilson v. Ivy*, 32 Miss. 233. And the sending of libelous matter by mail to another state, where the letter is opened and read, though the communication of the contents of the letter to the addressee in the foreign state may constitute a cause of action, yet there is nothing in the transaction by which we could attribute to the writer a concealment of the cause of action.

The action of the circuit court is affirmed.

LIBEL.—THE PUBLICATION of a libelous letter is complete when it is received and read: *Alabama etc. Ry. Co. v. Brooks*, 69 Miss. 168, 80 Am. St. Rep. 528.

LIMITATION OF ACTIONS.—IGNORANCE, FRAUD, and mistake as affecting the operation of the statute of limitations are treated in the extended note to *Alabama etc. Ry. Co. v. Jones*, 55 Am. St. Rep. 515, 516.

McCLINTOCK v. JOYNER.

[77 Mississippi, 678.]

LANDLORD AND TENANT—ASSIGNMENT OF RIGHT TO RENEW LEASE.—The right of a tenant to renew a lease is assignable, and the benefit of such right may be enforced by the assignee.

LANDLORD AND TENANT—RIGHT TO RENEW LEASE—WHEN MAY BE EXERCISED.—The right of the tenant to renew the lease not limited by grant may be exercised at any time during the original term, unless the tenant is called upon by the landlord to exercise or decline his privilege of renewal at an earlier period.

Griffin & Larkin, for the appellant.

J. H. Wynn, for the appellee.

680 **TERRAL, J.** The appellee addressed to the assignor of appellant the following letter:

“Belzoni, Washington County, Miss., Nov. 1, 1896.
“J. W. McClintock.

“Dear Sir: In consideration of the monthly payment of twenty dollars payable on the first day of each month, I will lease you my two-story frame storehouse on lot number five, north of Main street, for a term of three years, commencing

with the first day of November, 1896, and with the privilege of your renting for a second term of three or five years at the same price, the above being the same storehouse built by R. L. Edwards during the months of September and October, 1896.

“EDNA JOYNER.”

J. W. McClintock accepted said lease by entering into the occupation of said storehouse. He paid the rent as required until the sixteenth day of August, 1899, when, in consideration of one hundred dollars, he sold and transferred by writing his title and interest in said lease to S. H. McClintock, who, having complied with all the conditions of said lease, and before its expiration, demanded of Mrs. Joyner a renewal of said lease for five years. This request Mrs. Joyner refused, though she had notice of the assignment of said lease to him, and of his wish to renew the same before its expiration. McClintock sued Mrs. Joyner for breach of contract in the sum of five hundred dollars. A demurrer to the declaration was sustained, and McClintock appeals. The declaration states a good cause of action, and the demurrer should have been overruled.

The right of renewal is often a valuable right, and it seems to have so proved in this case. The right of renewal constitutes a part of the tenant's interest in the land, and may be sold and assigned by him, and the benefits of this right may be enforced by the assignee: Wood on Landlord and Tenant, 675.

681 Mrs. Joyner, of course, might have limited the time in which McClintock could exercise his privilege of renewal, but not having done so, his option continued during his tenancy, and could not have been determined until the expiration of his tenancy unless Mrs. Joyner had called upon him to exercise or decline his privilege at an earlier period: Moss v. Barton, 35 Beav. 197; Hersey v. Giblett, 18 Beav. 174; Woodfall on Landlord and Tenant, *369.

Mrs. Joyner, having deprived the plaintiff of a valuable right purchased of her, the damage arising to him on that account should be borne by her.

Reversed, demurrer overruled, and remanded.

LEASE.—THE PRIVILEGE OF RENEWING a lease is a vendible interest: *Phyfe v. Wardell*, 5 Paige, 268, 28 Am. Dec. 430. A covenant to renew a lease runs with the land, and the assignee of the lease may require specific performance of it: *Robinson v. Perry*, 21 Ga. 183, 68 Am. Dec. 455. See, further, on the renewal of leases, *Johnson's Appeal*, 115 Pa. St. 120, 2 Am. St. Rep. 539; *Herter v. Mullen*, 159 N. Y. 28, 70 Am. St. Rep. 517; note to *Blumenberg v. Myres*, 91 Am. Dec. 563-566.

WILSON v. ALABAMA GREAT SOUTHERN RAILROAD COMPANY.

[77 Mississippi, 714.]

HEALTH AND QUARANTINE.—ORDERS OF BOARDS OF HEALTH must stand the test of reasonableness, and whether they are reasonable or not is for the court to determine.

HEALTH AND QUARANTINE—ORDERS OF BOARDS OF HEALTH, WHEN UNREASONABLE.—An order of a board of health prohibiting all persons from getting off trains and boats at any point within the state, because "there is yellow fever at several places along the coast in this state, and several cases of yellow fever and reported suspected cases at various other places throughout the state," is unreasonable and void.

HEALTH AND QUARANTINE—ORDERS OF BOARDS OF HEALTH—REASONABLENESS.—An order of a board of health that no person who has been exposed to infection, or who has come from an infected point, or who is destined for an infected point, shall be allowed to come into the state, is reasonable and valid; but an order that no person whomsoever shall be allowed to get off of a train of cars or a boat anywhere within the state is unreasonable and void.

HEALTH AND QUARANTINE—LIABILITY OF RAILROADS.—A railroad company must take the risk of the validity of a quarantine order of a board of health, when it yields to such order alone, and when its defense is not that it yielded because only of the order, but because also of vis major, its defense is maintained if it appears that such vis major or uncontrollable necessity was the real cause of its action.

APPELLATE PRACTICE—FATAL ERROR.—If it appears to the supreme court that the plaintiff has no cause of action or the defendant no defense which the law can allow to stand, the court must act upon the fatal infirmity presented by the record although no objection was made thereto in the lower court.

W. T. Houston, for the appellant.

Fewell & Son, for the appellee.

¶17 WHITFIELD, C. J. Appellant's rights were fixed September 23, 1897, and are not affected by the provisions of the second and ninth sections of the act of 1898: Laws 1898, p. 93.

The presence of all three of the members of the executive committee of the state board of health was necessary to a valid order on September 15, 1897, when the order in question was made: Laws 1894, c. 38, p. 33. This is made clear, as the legislative purpose, by the amendment (Laws 1898, sec. 2, p. 93), ¶18 providing, for the first time, that "the presence of two members of the executive committee" would do thereafter. The order in question was made by only two members, it not being shown that three were present. Nor is it shown that

the board appointed the chairman. Had three been present, and two made the order, this objection would have been obviated.

But the order must be held void for unreasonableness also. All orders of the board of health must stand the test of reasonableness. This order provided: "On account of yellow fever at several places along the coast, in this state, and several cases of yellow fever at Edwards, and reported suspected cases at various other points through this state, until further ordered by this board, no person will be allowed to get off trains and boats at any point or station in the state of Mississippi," etc., the rest of the order not modifying in any way this provision.

Now, the appellant was from Meridian, a noninfected point, had a duly issued health certificate, and was returning from Nashville, a noninfected point, to his home in Meridian, on a valid excursion return ticket. He had not been exposed to infection. The order was not that no person who had been exposed to infection, or who came from an infected point, or who was destined for an infected point, should be allowed to come into the state, but that no person whosoever, from any point whatsoever, should be allowed to get off anywhere in the state. The authorities are uniform that this sort of an order is wholly indefensible. It has been expressly so held in this state (*Kosciusko v. Slomberg*, 68 Miss. 469, 24 Am. St. Rep. 281, which also holds that the reasonableness of these orders is, of course, for the court to determine), and it has been so held in many authorities, among which see specially, *In re Smith*, 146 N. Y. 68, 48 Am. St. Rep. 769, the note to *Hurst v. Warner*, 102 Mich. 238, 47 Am. St. Rep. 525, 26 L. R. Ann. 484, and *State v. Burdge*, 95 Wis. 390, 60 Am. St. Rep. 123, 37 L. R. Ann. 162 (2), citing with approval *Kosciusko v. Slomberg*, 68 Miss. 469, 24 Am. St. Rep. 281. See particularly the reasoning of the court in *In re Smith*, 146 N. Y. 68, 48 Am. St. Rep. 769.

Regard must be had to the maxim, "*Salus populi suprema lex*," of course. But regard must also be had to the liberty of the citizen, and both principles must be given reciprocal play. The public health must be vigilantly cared for, but with due caution that no order intended to secure it shall be so sweeping and arbitrary as to interfere unreasonably with the citizen's right of return to his home, neither he nor it having been exposed to infection.

With every disposition to uphold all reasonable regulations of our efficient and faithful board of health, we are constrained, by the oft-settled doctrines applicable, to declare this order void for unreasonableness. Doubtless this order would not have been given its unconfined sweep but for the hurry and excitement of the times. The railroad company must take the risk, as all citizens do, as to the validity of such orders, when it yields to the order alone; and when its defense is, not that it yielded obedience because only of the order, but because also of vis major—a shotgun quarantine, for example—its defense will be maintained if it shall appear that such vis major, such uncontrollable necessity, was the real cause of its action. It need not go to the extent of actual collision with force marshaled by necessity. But it must show its action was due to such force existing and capable of controlling its actions.

But here it is clear that was not the case, and the action of the appellee was due wholly to the void order. The appellant was not even brought to the state line, and was once put off in Tennessee, and actually did come into Meridian without hindrance in a private conveyance after he was put off. It was not shown even that the order was temporary, or that it was ever rescinded.

Ordinarily, it is true that objections not specifically made ⁷²⁰ below cannot here be relied on. The reason of that rule, which gives it its life, is that the opposite party may have opportunity to meet and obviate the objection. But where the court can see, as to the plaintiff, that he has no cause of action on which a judgment can be legally pronounced, or, as to the defendant, that he has no defense which the law can allow to stand, there is presented, in both cases equally, a case wherein it is not legally possible to obviate the fatal fault, if opportunity to do so had been given, and this court must in such case act upon the fatal infirmity presented by the record. It was error to grant the peremptory instruction.

Reversed and remanded.

QUARANTINE REGULATIONS must be reasonable. Whether or not they are is a question for the court: See the monographic note to *Hurst v. Warner*, 47 Am. St. Rep. 542, on quarantine and health laws and regulations. This subject is further treated in the note to *Markham v. Brown*, 92 Am. Dec. 76-80; *Compagnie Francaise etc. v. State Board of Health*, 51 La. Ann. 645, 72 Am. St. Rep. 458.

CHEAIRS v. COATS.

[77 Mississippi, 846.]

LANDLORD AND TENANT—EVICTION FROM PART OF PREMISES—APPORTIONMENT OF RENT.—If a tenant is evicted from part of the leased premises through a sale under a deed of trust of which he had knowledge when taking the lease, he is not entitled to occupy the remaining part of the premises rent free, but is liable for a due proportion of the rent for that part.

LANDLORD AND TENANT—EVICTION FROM PART OF PREMISES—APPORTIONMENT OF RENT.—If a lessee is evicted from part of the premises by a paramount title, and continues in possession of the other part, his rent must be apportioned, and he must pay a reasonable proportion of the rent for the land held by him, and cannot hold it rent free.

LANDLORD AND TENANT—EVICTION FROM PART OF PREMISES—UNLAWFUL DETAINER—EVIDENCE.—In an action by a landlord in unlawful detainer, against his tenant, evicted from part of the premises, but occupying the remainder and refusing to pay any rent therefor, evidence is admissible to show that such eviction was by paramount title of which the tenant had notice when taking the lease. Evidence is also admissible to show a pro rata distribution of the rent for that part of the premises which the tenant continues to occupy.

D. A. Scott, for the appellant.

J. W. Cutrer, for the appellee.

847 **TERRAL, J.** Mrs. Cheairs, the plaintiff below, brought unlawful detainer against J. R. Coats for certain lands described in her complaint. Mrs. Cheairs, as administratrix of the estate of S. D. Cheairs, deceased, had been authorized by the chancery court to rent the lands of the decedent for fifteen years for the purpose of getting money for the payment of the debts ⁸⁴⁸ of decedent; and no question is made as to her authority to make the lease. She thereupon leased some thirteen hundred and sixty acres, more or less, of land belonging to the estate of said decedent, for ten years to the defendant, J. R. Coats, commencing January, 1894, at a rental of two thousand eight hundred dollars per year. The lease expressly provided that if the rent was not promptly paid Mrs. Cheairs might declare the lease void and reoccupy the lands at once. Mr. Coats paid the rent for the years 1894, 1895, and 1896, but refused to pay the rent, or a due proportion thereof, for the year 1897 because he had been evicted of about four hundred and eighty acres of said land. The land, thirteen hundred and sixty acres, consisted of four separate and distinct tracts. At the time of the lease the four hundred and eighty acres

of which the defendant was subsequently evicted was under a deed of trust for debt, and was thereafter sold and bought by the Equitable Mortgage Company, the holder of said deed of trust.

The defendant refused to pay the rent for 1897, or a due proportion of it, for the lands held by him, and the plaintiff brought this action of unlawful detainer. The defendant does not claim that he has paid a prorated part of the rent, but rests his defense upon the ground that, being evicted of a part of the leased premises, the rent is suspended, and though he holds possession of a part of the leased premises (some nine hundred acres), yet he is discharged from the payment of any rent for the land still occupied by him because of his eviction of a part of the premises. This contention cannot be supported. Where a lessee is evicted from a part of the premises by a paramount title, and continues in possession of other parts of the premises, his rent will be apportioned, and he will be required to pay only a reasonable proportion of the rent for the land held by him, but he will not be permitted to hold any part of the premises without paying a proper rent for such part. Here the tenant is in possession of a large part of the premises and refuses to pay any rent therefor, and also refuses possession to the lessor. His action is inequitable and unlawful.

849 The lessor proposed to show that when Coats took the lease he knew that a part of the lands were under a deed of trust for debt, and in consequence must have known that by a sale thereunder the lessor's title would determine. She also offered evidence to ascertain a pro rata distribution of the rent, and also that she and Mr. Coats had agreed that eight hundred dollars was a proper reduction from the rent price in consequence of the eviction of Coats from the lands in section 35, but the court excluded the evidence. All this evidence was perfectly admissible.

There is authority that rent will not be apportioned in favor of a wrongdoer, but there is no wrongdoer here. The execution of the deed of trust was lawful, the sale of a part of the land under the deed of trust was lawful, and by the sale the ownership of the land was severed and the rent became due to the several owners in proportion to their several parts. 1 Thomas' Coke, first edition, *467, note, says: "It was formerly doubted whether a rent service, incident to a reversion, might be apportioned by a grant of part of the reversion, or whether the whole rent should not be extinct and lost, for,

since the reversion and rent incident thereto were entire in their creation, it was thought hard that they should be divided by the act of the lessor, and the tenant thereby liable to several actions and distresses. But this conception was too narrow and unfounded to prevail long, for if a person make a lease for three years of land, reserving three shillings rent, as he may dispose of the whole reversion, so he may also of any part of it, since it is a thing in its nature severable, and the rent as incident to the reversion may be also divided, because that, being a retribution for the land, ought to be paid to those who are to have the land upon the expiration of the lease, and hence it is that the rent, or a proportionate part thereof, passes immediately with the reversion without any expression being made of it in the grant, but the tenant has really no prejudice from such grant, because it is in his power, and it is his duty, to ⁸³⁰ prevent the several suits and distresses by a punctual payment of the rent," and the note and the text of the author clearly show that rent may be apportioned by any lawful act of the parties or by operation of law.

In *Linton v. Hart*, 25 Pa. St. 196, 64 Am. Dec. 691, Lewis, C. J., says: "The law will not apportion rent in favor of a wrongdoer, and therefore if a landlord wrongfully dispossesses his tenant of any portion of the demised premises, the rent is suspended for the whole. But the owner of a reversion has the right to sell the whole or any part of it. Such right is incident to the right of property, and necessary to the full enjoyment of it. The exercise of it is not wrongful, and therefore, in the case of a sale of a part of the reversion the law will apportion the rent; and the right of apportionment attaches the moment the sale is made." See, also, *Reed v. Ward*, 22 Pa. St. 144, where it is said: "It was at one time supposed by some that a rent service incident to a reversion was lost by a grant of part of the reversion, and could not be apportioned. But this is not the law. A reversion is a thing in its nature severable, and the owner has an undoubted right to dispose of the whole, or any part of it, according to his necessities or convenience, and the rent, as incident to it, being a retribution for the land, may be divided and ought to be paid to those who are to have the land upon the expiration of the lease. The accommodation of mankind requires that the rent shall be apportioned wherever there has been, either by act of the law or by the act of the party, a division made of the land out of which it issues, because without this privilege a man who can only dispose of his real

estate to advantage by dividing it might be forced to sacrifice it, and the heirs of a decedent might be seriously injured if they could not divide the inheritance without losing their remedies for the rents. A reversioner may sell his estate in different parts to as many different persons, and the tenant will be bound to pay to each his due proportion of the rent. Or if the lessor should die, and the estate descend to his heirs as tenants ⁸⁵¹ in common, the tenant will be bound to pay to each his proper proportion of the rent. The apportionment, where the parties cannot agree, is to be made by the jury according to the value, not the quantity of the respective parts."

We think that the circuit court erred.

The judgment is reversed, and the case is remanded, to be proceeded in according to the principles herein announced.

EVICTON OF TENANT—RENT.—An eviction by the lessor from a part of the leased premises suspends the entire rent until the tenant is restored to the full possession thereof: See the extended note to *Minneapolis Co-operative Co. v. Williamson*, 38 Am. St. Rep. 491; *Smith v. McEnany*, 170 Mass. 26, 64 Am. St. Rep. 272.

HALEY v. TAYLOR.

[77 Mississippi, 867.]

TRESPASS—CUTTING TIMBER—EVIDENCE.—Evidence of the purchase of timber from the person occupying the land, and his declaration of his right to sell it, is admissible to show the good faith of the purchaser, in an action against him by the owner to recover the statutory penalty for cutting such timber.

TRESPASS—COTENANCY—DEFENSE COMMON TO ALL. The right of cotenants to sue in trespass to recover the statutory penalty for cutting timber on their land is joint, and whatever constitutes a good defense as to one of them is good as against all.

COTENANCY—TRESPASS—DAMAGES—JOINT RIGHTS.—The right of action of cotenants for a trespass on their land is joint and whatever affects the right of one to recover in like manner affects them all. The quantum of damages which any one of them may recover is the quantum to which each of the others is limited. The assessment of damages must be joint, and cannot be severed by the jury.

R. N. Miller, for the appellants.

R. P. Willing, Jr., for the appellee.

§70 TERRAL, J. Eight tenants in common, among them two minors, brought an action for the statutory penalty of fifteen dollars a tree for cutting and removing from their lands five hundred pine trees. The defendant pleaded that he had cut down and removed from the lands of plaintiffs three hundred and sixty-five pine trees, but that he had done so upon a purchase of them from George Bennett, the sole tenant on the place, who claimed authority to make the sale, and the defendant believed him to have such authority.

The defendant showed that George Bennett was in possession of the locus in quo, and had been in possession thereof for nine or ten years under a contract of rent or purchase, and that Bennett claimed to be authorized by the Haleys to sell said timber to be sawed into lumber partly for the use of the place, and partly to have the advantage of a market while the defendant's sawmill was near by; and that, believing such authority, he cut and sawed into lumber three hundred and sixty-five trees.

Albert Haley, one of the adult tenants in common, and who attended to the management of the place, said in his testimony before the jury that he was not demanding the statutory penalty, but that all he wanted was whatever might be fair and just. It was shown that he had offered to take three hundred dollars in compromise of the claim, and had consented that his brother should compromise it at two hundred dollars. There was evidence also tending to show that after Taylor had cut a small part of the timber two of the plaintiffs became acquainted with the fact, and made **§71** no claim to the statutory penalty, but indirectly led Taylor to believe that his cutting of the timber was satisfactory to them.

The plaintiffs recovered a verdict for ninety-one dollars and twenty-five cents, and had judgment therefor, but take this appeal because the statutory penalty was not given to them. It is strenuously argued that the claim of authority of George Bennett to sell the plaintiff's timber, of itself, even if believed by Taylor, was incompetent to go to the jury on the question of good faith or for any purpose whatever, and that if the right to the penalty sued for of some of the cotenants was affected by any conduct of theirs in inducing Taylor to believe that the cutting of the timber was satisfactory to them, yet the other cotenants were entitled to recover their portion of the penalty by a peremptory instruction to the jury.

Upon the question of the good faith of Taylor in cutting timber from the plaintiffs' lands, we think that the declaration of

George Bennett of his authority to sell the timber, and the evidence of the sale of the same by Bennett to Taylor was competent evidence to go to the jury, and whether it be sufficient to protect the defendant against the collection of the penalty is alone for the jury: *Clark v. Field*, 42 Mich. 342.

The right of action of cotenants for trespass is a joint right, and whatever affects the right of one to recover will affect in like manner the right of each and all the others. The quantum of damages which any one of them may recover is the quantum to which each of the others will be limited. The assessment of the damages must be joint, and cannot be severed by the jury: *Merrill v. Berkshire*, 11 Pick. 269, 274; *Freeman on Cotenancy and Partition*, sec. 352; *Bradley v. Boynton*, 22 Me. 287, 39 Am. Dec. 582.

It would be incongruous to allow in the same action with a single count one of the cotenants to recover fifteen dollars per tree and another one less than fifty cents per tree.

Albert Haley, in his evidence before the jury, led them to believe that he only wished for a fair and just sum as damages, ⁸⁷² and other evidence in the case supported the jury in not affixing the statutory penalty. The matter has been settled by the jury, and the verdict being reasonable, and supported by evidence, the judgment is affirmed.

TRESPASS.—TENANTS IN COMMON must join in actions for trespass to lands: *Gent v. Lynch*, 23 Md. 58, 87 Am. Dec. 558. See, too, *Bradley v. Boynton*, 22 Me. 287, 39 Am. Dec. 582; *Mobley v. Bruner*, 59 Pa. St. 481, 98 Am. Dec. 360.

PENALTIES FOR CUTTING TIMBER are treated in the note to *Michigan Land etc. Co. v. Deer Lake Co.*, 1 Am. St. Rep. 496-498.

PRATT v. HARGREAVES.

[77 Mississippi, 892.]

WILLS—PROOF OF—SECONDARY EVIDENCE.—If an original will cannot, for any cause, be produced in court, its execution and contents may be proved by secondary evidence, and it may be admitted to probate on such evidence.

WILLS—PROOF OF—SECONDARY EVIDENCE.—If a person while domiciled in one state makes what is termed by the law of that state a valid nuncupative will by notarial act, and by such law made a public record not to be taken out of the state, and such person subsequently removes to, becomes a citizen of, and dies in another state, the will may be admitted to probate in the latter state upon the production and presentation of a duly authenticated copy thereof from the records of such other state.

WILLS—REVOCATION—REMOVAL OF TESTATOR.—If a valid will is made in one state, the removal of the testator to another state, and his becoming domiciled therein, do not revoke the will.

J. J. Ford and F. Johnston, for the appellant.

T. M. Miller and T. V. Noland, for the appellees.

SEE TERRAL, J. George K. Pratt filed his petition to the August term 1899, of the chancery court of Harrison county, seeking the probate of the last will and testament of Mrs. Louisa J. Bidwell, deceased. From the petition demurred to, it appears that Mrs. Bidwell departed this life on the sixteenth day of May, 1897, at her place of fixed residence in Harrison county, this state; that on the fourth day of June, 1890, Mrs. Bidwell, being of sound and disposing mind and over the age of twenty-one years, executed her last will and testament in the presence of four subscribing witnesses thereto; that said will was executed by Mrs. Bidwell in the city of New Orleans, where she was then domiciled; that said will was made in the form, as termed by the laws of Louisiana, of a nuncupative will by notarial act—that is, it was written out at length on the records of the notarial acts of George C. Proot, a notary of said city of New Orleans, and was subscribed by said testatrix, and by said Proot and three other credible witnesses; that by the laws of the state of Louisiana said will of Mrs. Bidwell, from its manner of **SEE** execution, became a public record of said state, irremovable therefrom for any purpose, and that, being unable to obtain said original will, the petitioner files with his petition a copy of said will duly authenticated by said George C. Proot, for the probate thereof; and that Bella P. Hargreaves and Agnes E. Carey, of the state of Texas and as the heirs of Mrs. Bidwell, have filed a caveat against the probate of said will. It further appears that Mrs. Bidwell at her death was the owner of real and personal property in said Harrison county, and that said George K. Pratt is named as executor of said will.

The petition prayed that the last will and testament of Mrs. Bidwell as contained in the notarial acts of said George C. Proot, of which an authenticated copy is filed with said petition, be established and declared the last will and testament of Mrs. Louisa J. Bidwell. Bella P. Hargreaves and Agnes E. Carey, the heirs of Mrs. Bidwell, demurred to said petition. The demurrer was sustained and the petition was dismissed. The petitioner, George K. Pratt, appeals.

The decision of the chancery court is sustained, as it is claimed by the contestant, upon the consideration, that if the will of Mrs. Bidwell of June 4, 1890, was a valid will, it was revoked by the removal of Mrs. Bidwell to Mississippi and by her becoming domiciled here; or, secondly, if still valid, it cannot be probated in the chancery court of Harrison county unless the original will be brought into the court and be there filed as a permanent record thereof. And it is admitted that by the laws of Louisiana this cannot be done.

It would be mere conjecture for us to suppose that Mrs. Bidwell knew that her notarial will before Proot could not be proven in Mississippi, or that she intended, by removing to Mississippi, to revoke that will. Certainly, Mrs. Bidwell might have revoked her notarial will at any time she had chosen so to do, but we cannot regard the making of her domicile in Mississippi as evidence of that intention.

^{see} Nor can we suppose that the inability of the proponent to produce the original will in the chancery court of Harrison county can affect the question of the probate of it, under the circumstances of this case.

There is abundant authority, as the learned counsel for contestant admit, that if an original will cannot be produced in court because it is lost or destroyed, that such accident would not stand in the way of the court in proving by secondary evidence its execution and contents, and of establishing the will so lost or destroyed. And if a lost or destroyed will may be established by secondary evidence of its execution and contents, we see no good reason why a will in the situation of the one before the court may not be proven and established.

A commission with letters rogatory was sent to a notary in the city of New Orleans, and the commission has been executed, and there appears no difficulty in making due proof of the execution of the will, of which an authenticated copy is filed with the application for the probate of the will. But the action of the court proceeds not upon the ground that no sufficient proof could be made of the execution of the will, but upon the ground that the rules of law do not allow of any proof in the case unless the original paper be brought before the court. Unless there be immovable property of Mrs. Bidwell in Louisiana affected by this will, it is a singular law of our sister state that keeps this document there where it can effect no good; but it would be more singular if the laws of Mississippi should permit the laws of another state to render ineffectual the just

rights of the citizens of Mississippi. If a resident of Louisiana had possession of the will and refused to give it up, we doubt not that proof of the document would be admitted here by secondary evidence of its contents whenever such proof should be necessary to protect the rights of our citizens. Like proof should be admitted when the laws of a state intervene to shut off the production of the best evidence.

⁸⁹⁹ The domiciliation of Mrs. Bidwell in Harrison county at her death makes it necessary that her will be probated in said county both as to all her personal property, which is governed in the distribution by the laws of the state of the last domicile, and also as to all her real estate in Mississippi, and unless, so probated, it becomes a useless document as to all her personal estate everywhere, and also as to all her real estate in Mississippi. It is a maxim that every right has its remedy; but a right out of possession is worthless unless evidence may be had to establish it. Here we have a right, and the evidence to support it, but the question is whether the law furnishes a method of applying the evidence in support of the right.

In *Matter of Roberts*, 8 Paige, 519, an authenticated copy of the will of Catherine Roberts was established in the state of New York as her will, the original being in the island of Cuba, and required to be kept there by Spanish laws.

In *Mauri v. Hefferman*, 13 Johns. 58, it was held that a notarial copy of a contract was admissible in evidence, the original being in the possession of a notary out of the jurisdiction of the court.

In *Alvion v. Furnival*, 1 Crompt., M. & R. 272, it is held that an agreement of reference, made in France, was sufficiently proved by an examined copy of the evidence of the attesting witness, it appearing that the original was deposited with a notary at Paris for safe custody, and that it is the established usage in France not to allow the removal of a document so deposited.

In *Lunday v. Thomas*, 26 Ga. 537, it is said: "When a paper is beyond the jurisdiction of the court, verbal evidence of its contents is admissible."

In *Binney v. Russell*, 109 Mass. 55, a copy of a document which the witness refused to annex to his deposition was admitted in evidence. Same principle is held in *Burton v. Driggs*, 20 Wall. ⁹⁰⁰ 133; *Burnham v. Wood*, 8 N. H. 334; *Beattie v. Hilliard*, 55 N. H. 428; *Moody v. Commonwealth*, 4 Met. 1.

We think that the action of the court in sustaining the demurrer to the petition filed in this case is erroneous.

The said decree or order is reversed, the demurrer is overruled and the case is remanded to the chancery court of Harrison county for further proceedings.

WILLS.—RESORT TO SECONDARY EVIDENCE may be had where direct proof of the execution of a will cannot be adduced owing to the nature of the case: *Tynan v. Paschal*, 27 Tex. 286, 84 Am. Dec. 619.

ON NUNCUPATIVE WILLS, see the monographic note to *Wiley's Estate*, 67 Am. St. Rep. 572-579.

ON THE REVOCATION OF WILLS, see the monographic note to *Graham v. Burch*, 28 Am. St. Rep. 844-862.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

ARNOLD v. HENRY.

[155 Missouri, 48.]

OFFICE—INJUNCTION TO TRY TITLE TO.—A court of equity is without jurisdiction to hear and determine the right or title of a person to a public office in a suit by injunction, when the only property rights to be affected by such injunction are such as flow from the lawful incumbency of such office. A writ of prohibition may issue to prevent the equity court from proceeding in the matter.

OFFICE—INJUNCTION TO TRY TITLE TO.—A court of equity has no jurisdiction to try the title to a public office, whether the incumbent is an officer de jure or an officer de facto. Courts of law furnish ample remedies for such purpose.

E. C. Crow, attorney general, S. B. Jeffries, assistant attorney general, J. A. Reed, R. W. Quarles, J. S. Rust, H. C. Ward, and E. Robinson, for the relators.

Warren, Dean, & McLeod and Gage, Ladd & Small, for the respondents.

⁵⁰ **GANTT, C. J.** This is an original proceeding in this court to prevent the circuit court of Jackson county from taking further cognizance of a suit by defendant Harris in said court to enjoin H. Clay Arnold, J. H. Lipscomb, and C. E. Washburn from interfering with said Harris' access to and ⁵¹ use of the office of the board of election commissioners of Kansas City, its vaults, safe, books, records, papers, ballot boxes, tally sheets, forms and other property pertaining to the said office of election commissioner and from interfering with or molesting said Harris in the discharge of the duties of election commissioner of said city, until a judicial determina-

tion of the rights of Charles E. Washburn to the said office can be heard. Said suit for injunction was commenced about the twenty-fourth day of August, 1899.

On application to Judge Henry, a temporary restraining order was granted enjoining said Arnold, Washburn and Lipscomb from interfering with or preventing said Harris from having access to the office, records, papers, etc., of the board of election commissioners, and the same was made returnable August 25, 1899, at which time the hearing was continued until August 28, 1899, on which last-mentioned day said defendants filed their motion in writing to dissolve said temporary injunction because said circuit court had no jurisdiction thereof. In the meantime said defendants therein made application to one of the judges of this court in vacation for a provisional writ of prohibition, which was granted, and afterward, upon issues framed, was heard at this term of this court.

The facts out of which this controversy arises are briefly these: On or about the — day of September, 1895, Joseph Harris was appointed and duly qualified as a commissioner of elections for Kansas City, for a term of four years and until his successor should be duly appointed and qualified. Said appointment was made under an act of the general assembly of this state, approved May 31, 1895, and as such amended March 31, 1897, March 23, 1897, and March 26, 1897.

Said Harris, together with H. Clay Arnold and J. H. Lipscomb, constituted the board of election commissioners of said city; and as such board they had the custody of the ⁵² registry-books, poll-books, tally sheets, ballots and ballot boxes, etc., and the keys to the office of said board of election commissioners. On the nineteenth day of June, 1899, the general assembly further amended the act creating said board whereby section 91 of the act of May 31, 1895, as amended in 1897, was repealed and in lieu thereof a new section enacted.

Under this last amendment the governor, on August 21, 1899, appointed said Arnold, Lipscomb, and Washburn election commissioners, and they each took the oath and qualified as required by law, and afterward took possession of the office and of its official property and appurtenances.

Mr. Harris, claiming that the appointment of Washburn was illegal and in defiance of the law creating said board, brought his suit to enjoin the board from interfering with his occupancy of said office until Washburn's title could be determined.

1. The contention of plaintiffs is, that the bill for injunc-

tion, while nominally to preserve property rights, is after all, in substance, an effort to try Washburn's title to the office of commissioner in an injunction proceeding, and that the circuit court, as a court of chancery, has no such power. It must be noted in the beginning of this discussion that the respondents concede that the law of 1899 is constitutional.

Their contention is that the governor had no right to appoint a Republican as member of the board of election commissioners outside of the three names submitted to him by the city central committee of the Republican party of Kansas City, as prescribed by the act of 1899. A most elaborate brief as to the power of the governor to make the appointment has been filed in addition to the very able oral argument submitted by counsel for respondents, but in this case the question for decision is, Did the circuit court have jurisdiction to hear and determine the right of respondent Harris to the office of election commissioner in a suit by ³³ injunction? Because notwithstanding the ingenuity of counsel, it is entirely plain that the only property rights to be affected by said injunction were such and such only as flow from the lawful incumbency of said office. They are mere incidents of the office, and whoever is the lawful incumbent thereof is entitled to their possession: *State v. Withrow*, 154 Mo. 397.

Stripped, then, of the allegation as to the property of the board to which he was denied access, the remainder of the petition for injunction was an assertion of Harris' right to the office and denying the validity and legality of the appointment of Washburn.

As said by Judge Valliant in *State v. Aloe*, 152 Mo. 478: "The real and only purpose of the suit in the circuit court was to bar the entrance to the office of board of election commissioners by injunction, and to obtain a decree of chancery court declaring relator's title to the office invalid. This is a subject over which a chancery court has no jurisdiction. The courts of law are open to all persons who have rights of that nature which have been violated, and ample means are afforded in those courts for the vindication of such rights and the redress of their wrongs."

In this case the plaintiffs here, defendants in the injunction, were in the actual possession of the office and the property belonging thereto. The furniture and property belonging to and incident to the office of election commissioners was public property which the members of the board could only

have a political right to use by virtue of their office, and it is the settled law of this state and generally elsewhere that courts of equity have no jurisdiction in matters of an executive or political nature. To assume jurisdiction to control the exercise of executive or political powers would be to invade the domain of other departments of the government, and to trench upon the jurisdiction of the ⁵⁴ courts of common law: *Taylor v. Kercheval*, 82 Fed. Rep. 497; *In re Sawyer*, 124 U. S. 200; *Muhler v. Hedekin*, 119 Ind. 481; 2 Beach on Injunctions, sec. 1373; *State v. Aloe*, 152 Mo. 478; *State v. Withrow*, 154 Mo. 397.

Counsel have cited to our attention several cases from other jurisdictions maintaining the right to an injunction by an officer in the possession of an office to restrain an attempt to dispossess him, but in those states the courts determined the title to the office in the injunction proceedings. This is contrary to the oft-expressed views of this court.

In our opinion, the allegations of the appointment of Washburn, and his recognition as commissioner of election by the two members whose title is not disputed, establish that he is at least a *de facto* officer and member of the board, and the general structure of the bill otherwise was to have his appointment declared illegal and void, and such is the great burden of the argument by the counsel for Harris in this proceeding.

In a word, it is an attempt by a proceeding in equity to try the title to a political office, and we hold that equity has no such jurisdiction; that the courts of law furnish ample remedies for such a purpose, and we must decline in this proceeding to determine the validity of Washburn's title to the position.

A writ of prohibition is accordingly awarded.

Burgess, Brace, Robinson, Marshall, and Valliant, JJ., concur.

Judge Sherwood, not having been present at the argument, takes no part in the decision.

OFFICE.—AN INJUNCTION does not lie to try the title to an office: See the monographic note to *Fletcher v. Tuttle*, 42 Am. St. Rep. 236, 237.

EQUITY.—THE TITLE TO AN OFFICE cannot be tried in equity: *State v. Van Beek*, 87 Iowa, 569, 43 Am. St. Rep. 897.

UNION NATIONAL BANK v. STATE NATIONAL BANK.

[155 Missouri, 95.]

CORPORATIONS—FOREIGN—CONFLICT OF LAWS.—Judgments of a court of one state cannot determine the validity of a mortgage on land in another state, nor transfer the title to land in that state, and it can make no difference that one of the parties to such judgment is a corporation formed in the former state, and doing business in the latter state.

CORPORATIONS, FOREIGN—CONFLICT OF LAWS—CAPACITY TO HOLD LAND.—The capacity of a foreign corporation to acquire and hold land, as well as the validity of its mortgage thereon, must be determined by the courts of the state where the land is situated, and cannot be determined by the courts of the state where such corporation is organized.

CORPORATIONS, FOREIGN—EXECUTION OF MORTGAGE—CORPORATE ACT—CONFLICT OF LAWS.—If the majority of the directors of a corporation hold a meeting in a state other than that in which the corporation is organized, and execute a mortgage on land in that state to a bona fide creditor therein, such act is a corporate act and void, when the charter of the corporation provides that the action of any meeting of its directors held beyond the limits of the state shall be void unless such meeting is authorized or its acts ratified by two-thirds of the directors at a regular meeting, the action in executing such mortgage is neither thus authorized nor ratified.

CORPORATIONS, FOREIGN—EXECUTION OF VOID MORTGAGE—CONFLICT OF LAWS.—If a mortgage executed by a corporation in a state other than that in which it is organized is void because not executed in accordance with its charter, it is not legalized in the state wherein the land is situated by the fact that the corporation was organized to do business in that state, that it conveyed all of its property therein to secure a bona fide creditor therein, and that the mortgage was thus made to enable the corporation to pay its debts and carry on its business in that state.

CORPORATIONS—FOREIGN—CONFLICT OF LAWS.—Although a state may impose such terms and restrictions as it may see fit upon foreign corporations doing business therein or exclude them entirely, yet such corporations cannot transact corporate business in such state in any other manner than that prescribed by its charter. Hence, a mortgage executed by such corporation in such state in violation of the charter under which it was organized is void.

CORPORATIONS, FOREIGN—ATTACHMENT—COLLATERAL ATTACK—FRAUD.—The defense that a foreign corporation defendant in an attachment suit has its chief place of business within the state, and that ordinary legal process could have been served upon it therein, must, in the absence of fraud, be pleaded to the attachment, and cannot be raised in a collateral proceeding unless fraud is pleaded and proved.

V. Pike and Brown & Dolman, for the appellants.

Stauber, Crandall & Strop, for the respondent.

⁹⁸ BURGESS, J. This is an action by plaintiff, a national bank doing business in the city of Chicago, Illinois, against the defendant bank, doing business in the state of Missouri, and its codefendants, to have adjudged a certain deed of trust given by the John Moran Packing Company to the use of the defendant, the State National Bank, fraudulent ⁹⁹ and void, and to set the same aside, and to release the property therein described, upon which plaintiff has a judgment lien, in order that plaintiff may sell said property free from the encumbrance of said deed of trust, and that it may bring its full value at such sale.

The plaintiff, a creditor of the John Moran Packing Company, an Illinois corporation, doing business in this state, began suit by attachment against it in the circuit court of Buchanan county on the twenty-second day of February, 1895. Under the writ of attachment issued all of the property of the packing company, including that involved in this litigation, was levied upon. The attachment was sustained and judgment rendered in favor of plaintiff against said company for the sum of twenty-seven thousand and thirty-four dollars and ninety-one cents.

This suit was then instituted by plaintiff against the defendants to set aside a deed of trust executed on the same property by the John Moran Packing Company to the defendant Donovan on the eighteenth day of February, 1895, for the use of the defendant, the State National Bank, to secure two notes for twenty-five thousand dollars each, executed by the packing company, by its president, John Moran, to the State National Bank on November 8, 1894, and due respectively in three and four months. This deed of trust was authorized at a meeting held in the city of St. Joseph, at which only three of the board of directors were present, while the board was composed of five directors. The petition alleges that said deed of trust was fraudulently procured; that the meeting of the directors was illegal and void; and the execution of the deed of trust to the use of the defendant bank, by which it destroyed the corporate existence of the John Moran Packing Company as a going concern, was in violation of its charter, being the general law of the state of Illinois.

The answer of the State National Bank admits the incorporation of the plaintiff, and of the defendant State National ¹⁰⁰ Bank, as alleged in the petition, and denies all other allegations in the petition except as in the answer afterward stated. It

then alleges that on the eighteenth day of February, 1895, the John Moran Packing Company was justly indebted to the defendant bank in the sum of fifty thousand dollars for money borrowed, evidenced by two promissory notes for twenty-five thousand dollars each, and that on the day last named the John Moran Packing Company, by order of its board of directors, duly and lawfully made, and, for the purpose of securing the payment of said notes, executed and delivered to defendant Donovan as trustee the deed of trust in question. That on the — day of February, 1895, the defendant Andriano, as acting trustee in said deed of trust, sold the real estate therein described, and the defendant bank became the purchaser thereof. The answer then alleges that the John Moran Packing Company was at all the times mentioned in the petition and the answer, and at the time of and long before the creation of the indebtedness mentioned in said pleading, a corporation created and existing under the laws of Illinois, and doing business in that state, and also carrying on a separate and independent business in the state of Missouri, and located at Buchanan county in said state, but has never been a resident of this state. That the indebtedness aforesaid of said John Moran Packing Company to defendant bank was incurred and created in the state of Missouri, and was due and payable in said state to said bank, a citizen thereof. It then avers that any lien that plaintiff may have on said property was fraudulently procured by collusion with said John Moran and said packing company, and that there were no grounds of attachment against either of them at the time plaintiff sued out its writ.

Plaintiff in its reply to the answer of defendant bank alleged that the defendant bank had filed a bill in the courts of the state of Illinois against the plaintiff and others, to foreclose a mortgage on certain real estate lying in that ¹⁰¹ state, which mortgage was authorized and given to secure the same debt described in plaintiff's petition in this case, and based on the same facts, and involving the same question of the legality of the meeting held in St. Joseph, Missouri, February, 1895, and alleging that the adjudication of these questions by said court was an estoppel as to all questions actually involved and passed on in that case between the parties thereto.

The incorporation of the John Moran Packing Company was under the law of the state of Illinois and the certificate of incorporation recited that the location of the principal office was at that time in the city of Chicago, although all the business,

which was that of buying and selling, killing and packing, was done at St. Joseph, Missouri. John Moran owned all the stock, although some of it was in the name of others. Of the five directors, Moran, Fogarty, and Linaker lived in St. Joseph; Nash lived in Chicago; Moran was president and manager.

On the eighteenth day of February, 1895, the John Moran Packing Company executed the conveyance which is here sought to be set aside, as alleged in the petition. Before its execution, however, and on the same day, a meeting of the board of directors of the packing company was held at St. Joseph, Missouri, at which its execution was ordered. The meeting was properly called by Moran, as president of the company, and all the directors duly notified. Of the five directors, Moran, Taylor, and Fogarty were present, and all voted for the resolution directing the execution of the deed of trust. Nash and Linaker were not present.

The validity of these deeds was afterward questioned, and a meeting of the board of directors was held in Chicago, on March 25, 1895, at which all were present except Linaker, at which the former action of the board was ratified and new deeds ordered upon the same trusts without prejudice to any rights accrued under the former ones. ¹⁰² Nash voted against this resolution and all the other directors for it. Under this resolution deeds were executed on the same day in all respects like those of February 18th, except the dates.

The defendant bank pleaded in abatement to the attachment, but by agreement of the parties the plea was subsequently withdrawn, the attachment sustained, and judgment rendered in favor of plaintiff for the amount sued for.

Thereafter, the defendant, the State National Bank, brought suit in Illinois, to foreclose a mortgage bearing date February 16, 1895, executed by John Moran, and Kate Moran, his wife, on certain real estate in Chicago. In addition to Moran and wife, the defendants in the suit were the St. Joseph Stock Yards and Terminal Company, a subsequent mortgagee, and the Union National Bank of Chicago, a subsequent attaching creditor. In this suit it was held that the mortgage was not fraudulent, and was a first lien upon the property.

The Buchanan circuit court, on the tenth day of December, 1896, made its final decree in this case, setting aside the defendant's mortgage of February 18, 1895, so far as it affected the attachment lien of plaintiff, the court holding in a written opinion that the mortgage in question, dated February 18,

1895, was void because the meeting of the directors which authorized it was held in this state, and that the adjudication to that effect with reference to the Illinois mortgage constituted an estoppel upon the defendants in this case. After unsuccessful motion for a new trial defendant bank appeals.

No question of fraud is raised on this appeal, so that the questions to be passed upon are of law, rather than of fact, and the first of these is the effect of the judgment of the Illinois court with respect to the lands in that state, upon the land in this state. That suit was brought by the State National Bank to foreclose the mortgage executed by ¹⁰³ John Moran and wife to certain real estate in Chicago. To this action Moran and wife, the St. Joseph Stock Yards and Terminal Company, and the Union National Bank of Chicago, a subsequent attaching creditor, were made parties. It was decreed the foreclosure of the mortgage was a first lien upon the property described in the mortgage. But the St. Joseph or Missouri property which is in question here was not involved in that litigation, and it is difficult to see how the defendant bank is estopped by the result of that suit, with respect to any question of law involved in regard to the land in this state, over which it did not have and could not acquire jurisdiction.

"If the matter in controversy is land, or other immovable property, the judgment pronounced in the *forum rei sitae* is held to be of universal obligation, as to all the matters of right and title which it professes to decide in relation thereto. . . . On the other hand, a judgment in any foreign country, touching such immovables, will be held of no obligation": Story on Conflict of Laws, Redfield's ed., sec. 591.

"It has been declared to be the well-settled rule in America, that any title or interest in land or in other immovables can only be acquired or lost agreeably to the law of the place where the same is situated": 3 Am. & Eng. Ency. of Law, 1st ed., 565, note 4, and cases cited.

It may be conceded that a court of equity has power to decree the performance of a contract relating to land beyond its jurisdiction, where it has jurisdiction over the parties, but no such decree can affect the land, and can only be enforced by compelling the party who has contracted to do so to execute a conveyance in accordance with the terms of the contract. In such circumstance it is the conveyance, and not the decree of the court, that affects the land: *Davis v. Headley*, 22 N. J. Eq. 115.

So it has been held that a decree of a court in one state ¹⁰⁴ cannot determine the validity of a mortgage on property in

another state, or transfer the title to land in such state: Pittsburgh etc. R. Co.'s Appeal (Pa., May 31, 1886), 4 Atl. Rep. 385. This is upon the ground that a state court has no extraterritorial jurisdiction, and without authority to transfer title to land beyond its limits.

In *Osburn v. McCartney*, 121 Ill. 408, lands in Pennsylvania and Illinois were devised, and the courts of the former state had construed the will in a suit for the partition of the lands in that state, and it was held that the judgment in that suit did not operate as an estoppel in a suit in the Illinois courts for the portion of lands lying in that state, as the courts of the latter state were not bound by the construction of the will placed upon it by the courts of Pennsylvania, although the testator was a resident of that state.

It is for the courts of this state to determine the capacity of the John Moran Packing Company under the laws of this state to acquire and hold real estate, as well also as under its charter: *Jones on Real Property*, sec. 189; *Boyce v. St. Louis*, 29 Barb. 650.

This brings us to the consideration of the validity of the mortgage of the John Moran Packing Company to the defendant bank made February 18, 1895, conveying the property in this state, which plaintiff claims is void because the meeting of the directors which authorized it was held in this state, instead of Illinois.

By section 20 of chapter 32 of the Statutes of Illinois of 1896, in regard to corporations, it is provided that the action of any meeting of the directors of a private corporation, its trustees or other officers corresponding to trustees, held beyond the limits of the state, shall be void, unless such meeting was authorized or its acts ratified by a vote of two-thirds of the directors, trustees, or officers corresponding to trustees at a regular meeting.

It is plain that the meeting of the board of directors ¹⁰⁵ held in this state, which directed the execution of the conveyance of the packing company's landed property in this state for the benefit of defendant bank, was in direct violation of the charter of the company.

The general rule is that a board of directors of a corporation may hold their meetings and transact business outside the limits of the state where it is incorporated, unless it is otherwise prescribed by its charter or by-laws: 1 *Morawetz on Private Corporations*, 2d ed., sec. 533. But where it is provided by its charter, as in the case at bar, that the action of any meeting of the directors held beyond the limits of the state in which the

company is incorporated shall be void, unless such meeting be authorized or its acts ratified by a vote of two-thirds of the directors at a regular meeting, in the absence of such authorization or ratification, all of its acts of a corporate character are without authority and void. And such a ratification, in order to be effective as to other creditors, must occur before their rights have intervened. While the directors of the corporation were but its agents, Moran had no authority to convey its property without first being authorized to do so by action of the board of directors, and therefore the act of the board in directing the conveyance of the property to the use of defendant bank was strictly a corporate act, and entirely unlike other acts not of a corporate but of a business character, which may be conducted in any state, when authorized by the corporation and not prohibited by the laws of the state where transacted. While upon this and similar questions the authorities are in great conflict and irreconcilable, the decided weight seems to be to the effect that acts of a corporation of the character in question are corporate and not acts of agents. Assuming that we are correct in the position taken, it must follow that the meeting of the board in this state was within the prohibition of the charter of the packing ¹⁰⁶ company: *Talmadge v. North American Coal etc. Co.*, 3 Head, 338.

While it is not expressly so decided in either *McCall v. Byram Mfg. Co.*, 6 Conn. 428, or *Bassett v. Monte Christo etc. Min. Co.*, 15 Nev. 293, it is clearly intimated in both cases that where the directors of a corporation are restricted by its charter or the laws of the state from which it derives its existence, in holding meetings of a corporate character to the limits of the state in which it is incorporated, the exercise of such power beyond the limits of such state would be void.

Nor are we able to concur with the contention of defendant that the fact that the corporation was organized for the purpose of doing business in this state, that it conveyed all the property in this state to secure its only creditor in this state, that the mortgage was made for the purpose of enabling it to procure means with which to continue its business, paying its debts and going on with its operations, had the effect to legalize the mortgage which we have held was void because not executed in conformity with the provisions of the charter of the corporation.

That this state has the right to impose such terms, conditions, and restrictions as it may see fit upon foreign corporations doing business in this state, or exclude them entirely, may be conceded, but it does not hence follow that the packing com-

pany could transact its corporate business in this state in any other manner than that prescribed by its charter, nor could it do so if so inclined.

But defendant insists that this state has expressed its policy in the respect now under consideration by "An act to require every foreign corporation doing business in this state to have a public office or place in this state at which to transact its business, subjecting it to certain conditions, and requiring it to file its articles or charter of incorporation with the secretary of state, and to pay certain taxes and fees ¹⁰⁷ therein," approved April, 1891: Laws 1891, p. 75. It is true this law provides, among other things, that private corporations shall have and maintain a public office or place in this state for the transaction of its business, where legal service may be obtained upon it, and where proper books shall be kept to enable it to comply with the laws of this state; that it shall not mortgage, pledge, or otherwise encumber its real or personal property situated in this state to the injury or exclusion of any creditor of this state, and that no mortgage given to secure a debt created in another state shall take effect as against any citizen or corporation of this state until its liabilities to creditors of this state have been paid, but, as plaintiff is not a mortgagee or pledgee of the company in a mortgage or pledge executed either in this state or elsewhere, it does not come within the provisions of the act in respect to such matters and it has no tendency whatever to legalize the transaction in question.

It is contended that plaintiff's attachment constituted an encumbrance on the land attached, to the "exclusion" and "injury" of the defendant bank. That the packing company's chief place of business was in this state, as well as its president and managing officer, and was not subject to nonresident attachment. That it was doing business in this state upon condition that ordinary process could be served upon it. In the absence of fraud, these questions could only be raised by plea to the attachment, as otherwise the result of the attachment could not be attacked collaterally, but defendant alleged in its answer in the case in hand that any pretended lien the plaintiff may have upon the property in question was fraudulently procured by it and through collusion and combination with said John Moran and John Moran Packing Company; that at the time of the said pretended attachment, long before and ever since, there was no ground for the attachment against said parties.

¹⁰⁸ This defense was not sustained by the evidence, and the trial court so found, and we think correctly.

A final contention is that the deed of trust in question was made by John Moran, the president of the packing company, who was the owner of the entire capital stock of the company, and was valid without the action of the directors. In support of this position, defendant relies upon *Union Nat. Bank v. Shoemaker*, 68 Mo. App. 592. That case is predicated upon the ground that the persons who made the sale of the property involved in that litigation were the only stockholders and directors of the corporation, and were in fact the corporation, while in the case at bar there were four directors beside John Moran, and, although they may have been but nominal stockholders, they, together with Moran, composed the board of directors, and without the authority of the board he had no right to make the deed of trust. We do not, therefore, think that case an authority in this.

Now if the meeting of the board of directors directing John Moran, the president of the John Moran Packing Company, to make the conveyance had been held in Illinois, in accordance with the provisions of the charter of the company, instead of in this state, there is no question but that it would have been valid. But such an instrument cannot, under the circumstances disclosed by this record, be legally executed without such authority: *Missouri Lead etc. Co. v. Reinhard*, 114 Mo. 219, 35 Am. St. Rep. 746; *Calumet Paper Co. v. Haskell Show Ptg. Co.*, 144 Mo. 331, 66 Am. St. Rep. 425.

The judgment should be affirmed, and it is so ordered.

Gantt, P. J., and Sherwood, J., concur.

A FOREIGN CORPORATION HAS ONLY SUCH POWERS as are given it by the authority which created it, and it cannot do any act by virtue of those powers in any country or state where the law forbids it so to act: *Falls v. United States Sav. etc. Co.*, 97 Ala. 417, 38 Am. St. Rep. 194. Its charter or the laws to which it owes its existence have a paramount influence over its corporate powers whenever it undertakes to exercise them: *American Water Works Co. v. Farmers' etc. Co.*, 20 Colo. 203, 46 Am. St. Rep. 285.

FOREIGN CORPORATIONS.—A MORTGAGE given upon real estate situate in Alabama to a loan association situate in another state is governed by the law of Alabama: Monographic note to *McGarry v. Nicklin*, 55 Am. St. Rep. 51. See, also, *Thomson v. Kyle*, 39 Fla. 582, 63 Am. St. Rep. 193.

FOREIGN CORPORATION.—LANDS cannot be bought and sold or held by a foreign corporation in contravention of the public policy of a state: *Carroll v. East St. Louis*, 67 Ill. 568, 16 Am. Rep. 63.

UTLEY v. HILL.

[155 Missouri, 232.]

APPELLATE PRACTICE.—The judgment of the trial court sustaining part and overruling part of the exceptions to the report of a referee based upon conflicting evidence, none of which is preserved in the record, is conclusive and cannot be reviewed on appeal.

BANKS AND BANKING.—THE RELATION OF DEPOSITORS to a bank is that of ordinary debtor and creditor. It is a relation of contract and not of trust.

BANKS AND BANKING—RELATION OF DIRECTORS TO DEPOSITORS.—Ordinarily, there is no relation either of contract or trust between the creditor of a bank and the directors thereof.

BANKS AND BANKING—INSOLVENCY—LIABILITY OF DIRECTORS.—The directors of a bank who assent to the reception of deposits after they have knowledge that the bank is insolvent or in failing circumstances are not individually liable to depositors therefor, unless they had actual knowledge of such insolvency, and the mere failure or neglect on their part to investigate the affairs of the bank does not render them thus liable nor estop them from pleading ignorance of the financial condition of the bank.

BANKS AND BANKING—INSOLVENCY—KNOWLEDGE OF LIABILITY OF DIRECTORS.—"Actual knowledge" of the insolvent condition of a bank, required of its directors in order to hold them personally liable to depositors for deposits received while the bank is in that condition, means a guilty knowledge, and not an innocent, bona fide ignorance arising from neglect on their part to inquire into the financial condition of the bank.

BANKS AND BANKING—INSOLVENCY—LIABILITY OF DIRECTORS—FALSE STATEMENT OF FINANCIAL CONDITION.—The directors of an insolvent bank are not personally liable to depositors in a common-law action of deceit for a false statement of the financial condition of the bank made under a statutory requirement, when such statement is honestly believed to be true, and made in good faith, based upon details furnished by the cashier of the bank, whose reputation is good.

STATUTES, PENAL—CONSTRUCTION.—If a statute creates a new duty and imposes a penalty for failure to perform it, the penalty so prescribed is the exclusive remedy for its breach.

TRIAL.—EFFECT OF FACTS FOUND BY REFEREE.—In cases where a compulsory reference may be lawfully directed, the trial court may act upon the evidence reported by the referee, and, disregarding his findings, may find its own conclusion of facts.

L. Orear and A. F. Rector, for the appellant.

T. Shackelford, W. M. Williams, J. A. Rich, S. B. Burke, and D. D. Duggins, for the respondents.

²⁴⁰ **MARSHALL, J.** This is an action by a depositor in the Citizens' Stock Bank of Slater against the directors thereof to recover \$8,000, lost by the failure of that bank. The petition is in two counts. The first count is predicated upon sec-

tion 2760 of the Revised Statutes of 1889, which makes directors of a bank individually responsible for deposits accepted, with their assent, after they had knowledge that the bank is insolvent or in failing circumstances. The second count is an action for deceit, charging that the plaintiff was induced to make such deposit by reason of false and fraudulent representations that the bank was solvent, such representations consisting of the reports made to the secretary of state, as required by section 2752 of the Revised Statutes of 1889. All other such misrepresentations were withdrawn at the trial, and are therefore no longer in this case. The answers are general denials. On motion of the plaintiff, and over the objection of the defendants, the case was sent to a referee, "to hear and try the issues."

The referee's report, omitting formal preliminary recitals, is as follows:

"In said cause I find the issues upon the pleadings and ²⁴² evidence as follows: I find the issues in said cause, from the evidence, in favor of plaintiff; that is, I find the facts stated in the petition in both counts are true as therein alleged, except as herein otherwise indicated.

"I find especially the following facts: 1. That one Joseph Field acted as cashier of the Citizens' Stock Bank of Slater, Missouri, from 1882 until the assignment thereof, December 17, 1894; that during all that time he was elected at each annual election in December of each year a director of said bank, and was annually appointed cashier [here follows a finding as to the terms for which the defendants were elected directors, covering the periods involved in this case]; that defendant Hill was elected annually as president of said bank from the time of its organization, in September, 1882 (being elected annually by the board of directors), and that he continued to act as its president until the assignment of said bank. I further find from the evidence that the statements made to the said secretary of state, and signed by said president and cashier, were attested as correct by defendants J. W. Field, R. B. Eubank and W. I. Garnett, by their signatures as directors to the one purporting to show the condition of said bank February 20, 1894, and referred to in evidence; that the statement in evidence made to said secretary of state, and purporting to show the conditions of said bank June 2, 1894, was signed and attested by defendants P. C. Storts, R. B. Eubank, and W. I. Garnett as directors; that the statements in

evidence made to said secretary of state, showing the condition of said bank January 17, 1891, and May 16, 1891, were signed and attested by defendants William I. Garnett, J. W. Field, and R. B. Eubank as attesting directors; that the statements to said secretary of state in evidence, showing the condition of bank January 2, 1892, and May 16, 1892, were signed by the defendants William I. Garnett and J. W. Field; that the statements in evidence to said secretary of state showing the ²⁴² condition of said bank October 31, 1892, and April 22, 1893, were signed by defendants Garnett, Eubank, and Field as attesting directors; that the statement in evidence showing the condition of said bank September 16, 1893, made to said secretary of state, was signed by defendants Storts and R. B. Eubank; that at the time of signing said statements said defendants knew that the same would be published and were being published in the newspapers published and circulated in Slater, where said bank was situated; that the statements aforesaid represented and showed said bank to be in a good and solvent condition, whereas, in fact, I find from the evidence that said bank was insolvent at the dates mentioned in said several statements, and had been insolvent from December, 1887, until its close, December 15, 1894; that said several defendants, when they signed said several statements, did so without any examination of the books, notes, and securities claimed to be in the possession of said bank, and without knowing whether the statements contained therein as to the condition of said bank were true or not; that they severally signed said statements relying on said cashier's statement or representations that the same was true, and without knowing whether the same was true or not; that they signed said statements with the knowledge and expectation that the same would be published in the newspapers published and circulated among the people where the said bank was situated; that said statements were signed by said defendants without any order of the board of directors of said bank as such board; that said defendants signed said statements with full knowledge on their part that they had not examined the cash, notes or books showing the condition of said bank, and which purported to be in the possession of said bank. I find further from the evidence that the directors of said bank only held annual meetings, and then for the election of cashier and other officers; that these meetings were just after the annual election of directors by the stockholders; that they never at any ²⁴³ time

required the cashier or any of the officers of said bank to give any bond; that the reputation of said Joseph Field while acting as cashier of said bank was that of a good business man, as well as a man of integrity and wealth, up to the time of said bank's assignment, and that defendants had knowledge of and relied on said reputation of said cashier for integrity and wealth. I further find from the evidence that during the said time said defendants were acting as directors of said bank they were frequently about the bank, and had access to the books, papers, notes, and securities belonging to said bank, and that they could, by the exercise of ordinary care and diligence, have known the true condition of said bank at the time of said several statements so made to the secretary of state as aforesaid, or could, with the means of knowledge at their command, have known that said bank was insolvent at the dates of said several statements so signed by them as aforesaid, by examination. That the books of said bank, which were accessible to said defendants, and could have been examined by them if desired, showed that one Mead Mercantile Company was constantly indebted from December 30, 1887, to the date of said assignment to said bank, in divers large sums of money, evidenced by notes and overdrafts ranging from about \$4,500, November 7, 1887, up to \$77,000, December 15, 1894, with an overdraft of \$7,825.97 at last-named date. That said indebtedness, December, 1888, amounted to over \$60,000; June, 1889, to about \$44,000; December, 1890, \$45,000; December, 1891, to over \$74,000; June, 1892, over \$75,000; December, 1892, \$73,000, with overdraft for \$10,787.42 in addition; June, 1893, over \$73,000; December, 1893, \$73,000, with overdraft for \$12,474.49; June, 1894, \$64,500 in notes with overdraft of \$14,483.29; December 15, 1894, note for \$77,000, with overdraft for \$7,825.97. That one firm, composed of W. B. Storts and J. D. Eubank, styled 'Storts & Eubank,' were constantly indebted to said bank in notes and large overdrafts from December 30, 1887, ²⁴⁴ to February 13, 1892, in amounts ranging from \$52,000 at the former date in notes (and overdrafts for \$1,895.11) to \$117,294 at the latter date. That between said dates the amount of indebtedness gradually increased, until June, 1891, it amounted in notes to \$146,691, and overdraft for \$10,778.32. That their overdraft alone amounted, June 30, 1888, to \$16,401.19, with notes at over \$52,000. That their indebtedness in June, 1889, was over \$90,000; June, 1890, over \$122,000; December, 1890, over \$136,000. That said

firm continued indebted to said bank, according to the books at the time of the assignment of the bank, for \$117,294. That said book showed an individual indebtedness of said W. B. Storts of over \$8,000 in June, 1891; over \$19,000, December, 1891; nearly \$25,000, June, 1892; over \$30,000, December, 1892; over \$35,000, June, 1893; over \$38,000, December, 1893; over \$54,000, June, 1894; and over \$57,000, at the closing of said bank. That part of said indebtedness consisted in overdrafts at those dates. That the books of said bank showed on their face a constant indebtedness on the part of said cashier between December 30, 1887 (when he owed the bank \$7,000 in notes and overdrafts), and over \$19,000 at the close of the bank, on December 15, 1894. That the account of said cashier showed almost a constant overdraft and frequently for large amounts. For instance, in December, 1890, his account showed notes due from him \$6,000, and overdrafts \$13,529.46; June, 1892, \$11,340 in notes and over \$2,600 in overdrafts; in December, 1892, the same amount of notes, and \$9,341.84 overdrafts; June, 1893, notes due by him \$11,912, and overdraft \$11,939.83; December, 1893, over \$14,000 in notes and overdrafts; in June, 1894, \$12,100 in notes, and \$8,164.96 in overdrafts. That one firm, of B. P. Storts & Co. (said Joseph Field being a member of said firm), as shown by said books, was indebted to said bank in notes and overdrafts, in December, 1891, for over \$6,000; in June, 1892, nearly \$17,000; in December, ²⁴⁵ 1892, over \$15,000; in June, 1893, nearly \$17,000; in December, 1893, nearly \$22,000 (the overdrafts being over \$7,000); in June, 1894, over \$32,000; on December 15, 1894, \$42,300 in notes, and \$4,179.70 overdrafts. That one Josiah Baker, Jr., was between December 30, 1887, and December 15, 1894, constantly indebted, as shown by the books of said bank, for large amounts of notes and overdrafts—that is to say, over \$17,000 at the former date, and at the latter date, \$77,500 in notes and \$9,790.59 in overdrafts. That said accounts showed that in June, 1889, he owed the bank over \$86,000; June, 1890, about \$50,000; June, 1891, over \$76,000; June, 1892, \$83,000 in notes, and \$13,094.39 in overdrafts; June, 1892, over \$71,000; in December, 1893, over \$56,000; in June, 1894, over \$68,000. I find that said debtors were insolvent. I further find from the evidence that defendants all had knowledge that said debtors aforesaid were indebted to said bank at various times while they were acting as directors, but the evidence does not disclose that defendants had knowledge of the full extent of the

indebtedness of said defendants; that said defendants had knowledge that said Joseph Field was a member of the firm of B. P. Storts & Co.; that defendants had full knowledge that all said debtors aforesaid were using a good deal of money out of said bank, and that said Field, as cashier, was cautioned by them not to let any one man or party have too much money. I further find from the evidence that said directors, while acting as directors, committed to said cashier almost exclusively, if not entirely so, the matter of loaning money, and gave little or no personal attention on their part to the same; that, while they thus committed the management of loans and the taking of security to said cashier almost exclusively, they were about the bank frequently, making inquiry about the bank and its condition, and accepted assurances from said cashier that the same was always prospering; that by a by-law adopted by the stockholders of said bank in 1882 it was provided that the cashier 'shall have ²⁴⁶ full power and authority to create indebtedness against the bank, to sign all issues of indebtedness and make indorsements for the bank, and receive and receipt for and pay out money for the bank'; that defendants Garnett, Storts, and Hill were present at the adoption of said by-laws; that defendants knew during the time they were acting as directors that said bank was from time to time borrowing money from other banks, but it does not appear from the evidence that they had actual knowledge of the extent of the indebtedness of said Citizens' Stock Bank to other banks while acting as directors. I further find from the evidence that said cashier, Joseph Field, was a brother of defendant, J. W. Field, and that William Storts and B. P. Storts, debtors of said bank aforesaid, were and are the sons of defendant Storts; that Jerome D. Eubank, a member of said firm of Storts & Eubank, was and is a son of defendant R. B. Eubank. I furthermore find from the evidence that defendants at no time while acting as directors counted the cash or examined the securities and footed the same up, so as to know the amount of assets or examined the securities given, if any, to secure money loaned, and that they did not require such securities to be exhibited to them for their sanction, nor did they give special directions to said cashier not to loan to the various debtors aforesaid shown to be so largely indebted to said bank. I further find from the facts and circumstances in evidence that defendants had their suspicions aroused by the character and kind of business of some of said debtors of said bank to such an extent that

they were thereby put upon inquiry, and had they performed their duty, and examined properly into the facts, they could have discovered, by reason of such examination, the insolvency of said bank. I further find that said official statements, signed and attested by defendants, made to the secretary of state as aforesaid, were materially different from the general balance book kept by the cashier of said bank while defendants ²⁴⁷ were directors; that, by comparison of said official statements with said balance book, it will be seen that the assets and resources are often greatly inflated, often to the extent of many thousand dollars, while the liabilities often appear diminished by many thousands of dollars in the published statements as compared with the amounts shown by the books. Particularly is this shown to be true with reference to the items of 'Loans and Discounts, Undoubtedly Good, on Personal and Real Estate Security,' 'Due from Other Banks, Good on Sight Draft,' 'Cash and National Bank Notes,' 'Surplus Funds on Hand,' 'Deposits Subject to Draft at Sight by Banks,' 'Deposits Subject to Draft at Sight by Individuals,' 'Deposits Subject to Draft at Given Dates.' These discrepancies occur all along from 1887 until the close of the bank, and range in amounts from \$25,000 to \$50,000, and often more. Said published statements were materially false, and did not state or show the true condition of the bank at the dates mentioned therein, and particularly were false as to the items of the amount of loans and discounts, undoubtedly good, on personal or collateral security, and loans secured on real estate security. I find further that, if defendants did in fact examine the balance books kept by the bank, and compare the same with the statements in evidence signed and attested to be correct, they must necessarily have known such statements were false, but I conclude they did not make such comparisons or examinations. I furthermore find that had said directors at any of the dates when they made their said statements to the secretary of state and for publication, examined the books kept by said bank, they could have ascertained the indebtedness in favor of the bank, and the character of the notes and insufficiency of the securities therefor, to such an extent that they would thereby have discovered the insolvency of said bank. I think, as a matter of law, that when said defendants signed said statements to the secretary of state they should be held to have meant to do so of their own personal knowledge; ²⁴⁸ that the public had a right to rely on the correctness of such statements so published; that plaintiff

and the public had a right to rely on the published statements as being true, and that on the faith of such statements plaintiff did rely and deposit his money as stated in petition; that it was the duty of defendants, as managing officers of said bank, to know its condition, to acquaint themselves with the assets, cash and notes, and the nature of the security therefor; that they had no right to abdicate their function, and rely entirely upon the cashier employed by them, however good his reputation, to do their work, that if they could thus shield themselves from their duty of examining the books, and acquainting themselves with the loans made from time to time, and the securities taken therefor, there would be no necessity for the appointment of directors under our statutes; that the law requiring three directors to attest as correct the sworn statements of the cashier and president contemplates that said directors should not be mere figureheads, but that they should sign such statements with personal knowledge of what they were doing, otherwise the publication of such statement at the place where the bank is kept would be without significance; that these statements must have been intended to advise the public with reference to the financial condition of the bank, so the public could act advisedly as to making deposits; that defendants, as directors, having special means of knowledge, would be presumed by the public, from the nature of their positions, having access to the books, notes, securities, and cash of the bank (while the public has not) to have correct knowledge, and to make no statements that would be false or misleading; that having assumed to know, as of their own personal knowledge, the actual financial condition of the bank, and signed statements purporting to show a healthy, sound condition of the same, they must be held to have intended their statements to be believed, and, if in fact materially false, they will be bound for such false statements, and cannot ²⁴⁹ shield themselves under the plea that they were ignorant of the true condition of the bank when they signed such statement; that in order to hold the defendants liable, it is not necessary that they corruptly or intentionally signed statements knowing at the time they were false, and with the intention and purpose of deceiving the public thereby. In this case I do not find from the evidence that defendants continued on the business of the bank, for the purpose of enabling them to reimburse themselves on account of having signed and indorsed obligations of said bank which did not appear in said statements and representations

so made as charged in petition, nor that said business was continued for the purpose of enabling defendants to prefer themselves on account of deposits made in said bank by them as charged in said petition; that otherwise the facts so charged in the first and second counts of the petition, as hereinbefore modified, are found for plaintiff. The third count in said petition was dismissed by plaintiff. As a result of my conclusion as to the facts and the law applicable thereto I find that the defendants are indebted to plaintiff in the sum of \$7,760, being amount deposited by plaintiff, less a credit of three per cent paid by assignee of said Citizens' Stock Bank; that said amount so found shall bear interest from the filing of this suit, January 25, 1895, at six per cent."

And the referee also filed with his report all of the evidence taken on the hearing of said cause.

In due time the defendants filed exceptions (thirty-two in number) to the report. The court sustained the first, third, fourth, fifteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-fifth and twenty-sixth, and overruled the others.

Those sustained are as follows:

"We except to the report of the referee:

"1. Because said referee predicates his findings on the ground that the defendants had, in the management of the affairs of the Citizens' Stock Bank, as directors of said bank, ²⁵⁰ been guilty of negligence which was not an issue in this case, and had been settled by a judgment of this court in another case."

"3. Because the conclusion of law of said referee, as stated in his report, that the plaintiff is entitled to recover upon the first count of the petition, is not supported by the findings of fact made by said referee in said report, in this: That said referee does not find as a matter of fact that the defendants, or either of them, did receive or assent to the reception by the Citizens' Stock Bank of Slater of the deposits by plaintiff, or did create or assent to the creation of the debt due by such bank to the plaintiff after they, or either of them, had knowledge of the fact that said bank was insolvent or in failing circumstances, but, upon the contrary thereof, found, as a matter of fact, that said directors did not have such knowledge, but simply were put upon inquiry, or, by the exercise of reasonable diligence, might have obtained knowledge of the insolvency of the bank, before plaintiff's deposits were made in said bank or the indebtedness to him was created; and, as a matter

of law upon this finding of fact, the plaintiff is not entitled to recover upon the first count of the petition, as the referee erroneously reports.

"4. Because the referee erroneously finds as a matter of fact that the defendants were guilty of negligence in the discharge of their duties as directors of said bank, and concludes as a matter of law that by reason of such negligence the plaintiff is entitled to recover upon the first count of the petition upon the statutory cause given by section 2760 of the Revised Statutes of this state, and also is entitled to recover upon the second count for fraudulent representations, whereas, as a matter of law, such negligence is not sufficient to authorize a recovery upon either count of the petition herein."

"15. Because the referee finds that the defendants, as directors of the Citizens' Stock Bank, had their suspicions aroused by the character and kinds of business of some of the ²⁵¹ debtors of said bank to such an extent that they were put upon inquiry, and by properly discharging their duties could have discovered the insolvency of the bank, which finding is against the evidence and against the weight of evidence."

"17. Because the referee failed to find specifically each fact made an issue by the pleadings, and did not find whether or not the defendants, or either of them, received or assented to the reception of a deposit or deposits in the Citizens' Stock Bank by the plaintiff, or created or assented to the creation of a debt by the Citizens' Stock Bank to the plaintiff, when they knew the bank to be insolvent.

"18. Because the referee finds that the statements furnished by the Citizens' Stock Bank to the secretary of state were intended by the defendants to induce the plaintiff to deposit his money in said bank or permit said bank to become indebted to him, which finding is against the evidence and against the weight of evidence.

"19. Because the referee finds that the defendants were guilty of negligence in the performance of their duties as directors of the Citizens' Stock Bank, and bases his conclusions of law that the plaintiff is entitled to recover upon such findings, when in truth no such issue is raised by the petition in this cause, nor were any such issues referred to said referee, and the finding upon that point is not within the issues made by the pleadings in this cause.

"20. Because the referee erroneously reports as a matter of law that defendants must be held to have intended the state-

ments filed with the secretary of state by the Citizens' Stock Bank, and thereafter published in the local papers at Slater, attested by them as directors of said bank, to have been made as of their own personal knowledge, whereas, as a matter of law, the plaintiff had no right to rely upon said statements as having been made by defendants as of their own personal knowledge, or as their personal statements and representations.

²⁵² "21. Because said referee erroneously reports and finds as a conclusion of law that the reports of the financial condition of said bank made to the secretary of state, and published in the papers at Slater, were intended by defendants to induce the plaintiff and the public to give credit to said bank, and that said statements were the individual statements of the directors, and not the statements of the corporation, and therein said referee erred as a matter of law.

"22. Because the uncontradicted facts introduced before the referee, and included in the testimony returned by him with his report, showed that the defendants, in assigning and attesting the statements of the financial condition of said bank to be filed with the secretary of state, in good faith, wholly believing said statements to be true, and believing that they had sufficient knowledge of the affairs of said bank for the said statements, and yet said referee wholly fails to find and report distinctly and in express terms his conclusion of fact that said defendants did believe said statements to be true, and did make the same in good faith, only relying upon the reports made to them by the officers in charge of the books of said bank, when the evidence before said referee fully established said fact, and the same should have been found as a matter of fact by said referee, and not stated in his report inferentially, as said referee does state the same."

"25. Because the referee erroneously reports and holds as a matter of law that when the defendants, as directors of the Citizens' Stock Bank, signed and attested reports of its financial condition, that it was their duty to know the condition of the bank, and that they had no right to rely upon the statements of the cashier and officers in charge of the books as to their contents, but were themselves bound to know what said books contained, and that they must have had personal knowledge of the exact financial condition of the bank, and, in effect, that they were warrantors of the truthfulness of the statements aforesaid, and are liable for fraudulent misrepresentations ²⁵³ if said statements were not absolutely correct, although

believed by them to be true, and signed in reliance upon statements furnished by officers in charge of the bank of good repute, and without any facts known to defendants to excite their suspicions that such representations were false, whereas the defendants could not be held liable in an action of deceit upon any such finding of facts, and the referee erroneously reports to the contrary.

"26. Because the referee's conclusions of law as to the second count of the petition are not supported by his findings of facts applicable to said count, in this: That the facts found by said referee as to the statements of the financial condition of said bank showed that said statements were attested by defendants and signed by them as directors of said bank, and that said statements appear to be the actual statements of the corporation, and were attested by defendants under the honest belief that they were true, and in reliance upon statements made to them by officers in charge of the books of the bank, and that the defendants could not be held to have made said statements falsely and fraudulently, upon the facts found by said referee, nor can they be held liable upon such facts in an action of deceit for the statements therein referred to."

These exceptions were afterward taken up by the court for hearing, to wit, on the ——— day of August, 1897, at the said June term of the said circuit court, and, after hearing the argument of counsel, the said exceptions were taken under advisement by the court until the October term, 1897, of said Saline county circuit court.

Afterward, on the first day of the said October term, 1897, to wit, on the fourth day of October, 1897, the plaintiff asked the court to give the following declarations of law:

"The court declares the law as follows:

"1. That if the evidence shows that the defendants were directors of the Citizens' Stock Bank, and that the same was a banking institution, organized and doing business under the ²⁵⁴ provisions of chapter 42, article 7, of the Revised Statutes of 1889, at the time stated in the plaintiff's petition, and that the said defendants, as such directors, kept said bank open for the reception of deposits therein, and while so keeping said bank open for that purpose the plaintiff deposited therein the sum of money alleged in the petition, and that the said defendants assented to the reception of said deposit after they had knowledge of the fact that the said bank was in an insolvent condition or in failing circumstances, then the finding must be for

the plaintiff, and his damages assessed at such sum as the evidence may show was so deposited by him in said banking institution and remains unpaid.

"2. The court further declares the law to be that if the defendant directors knew that the Citizens' Stock Bank was open for the transaction of business and the reception of deposits at the time that the plaintiff deposited his money in said bank, as stated in the petition, then the said defendants must be found as assenting to the reception of said deposits by said bank, unless the defendant directors objected thereto.

"3. The court further declares the law to be that it was the duty of the defendant directors, under their office, to manage and control the affairs of the Citizens' Stock Bank, and it was their duty to know the condition of said bank, and, if the evidence shows that the plaintiff deposited his money in said bank while the same was in an insolvent condition or in failing circumstances, the law presumes that the said deposit was made with the assent of the defendants as directors, and that they had knowledge of such insolvency at the time; and, unless the defendants rebut said presumption by evidence, such presumption becomes conclusive, and the burden of proof is placed upon the defendants to show want of such knowledge or assent; and where such legal presumption is sought to be overcome by evidence, as in this case, the presumption of knowledge of said bank's insolvency is sought to be denied by the testimony of the defendants, the said knowledge must be ~~263~~ found as a fact; but such knowledge need not be proven by direct evidence, but may be proven by facts and circumstances. And if the evidence shows that the defendants had opportunities for knowing the true condition of said bank, and were frequently at its banking-house, and made inquiries of its officers as to its condition, and examined its assets and books, and had knowledge of such facts and circumstances which, if followed up by a reasonably prudent person, would have disclosed the true condition of said bank, then such knowledge may be inferred from such facts and circumstances and such opportunities for knowing the condition of said bank.

"4. The court further declares the law to be that if the evidence shows that the plaintiff, at the time stated in the second count of the petition, deposited any sum of money in the Citizens' Stock Bank, and prior to making said deposit the defendants represented the said bank to be in a solvent condition, by making and publishing written statements showing

said bank to be in a solvent condition, which said statements were seen and relied upon by the plaintiff before making said deposits, and that at the time said statements were so made and published by the defendants, the said bank was in an insolvent condition, and that said statements were false, and that the defendants knew at the time that said statements were false, or that the defendants were conscious of the fact that they did not know whether the said statements were true or false, and published the same knowing that they had no knowledge as to whether said statements were true or false, and such statements were made for the purpose of inducing the plaintiff or other persons who might see them to believe that said bank was in a solvent condition, then the finding must be for the plaintiff, and his damages assessed at such sum as the evidence may show was so deposited by him in said bank and such sum as may remain unpaid.

"5. The court further declares the law to be that the statements required by law to be made to the secretary of ²⁵⁶ state by the defendant directors should be a true statement of the condition of the Citizens' Stock Bank, of which they were directors, at the time stated in said statements so made and signed by them, and that the said statements are for the information of the public when the same are published as required by law, and that the plaintiff and the public had a right to rely upon such published statements as being true, and that said statements read in evidence purported to be the corporate act of the board of directors of the Citizens' Stock Bank, and purported to be within the personal knowledge of such of the defendants as signed the same; and if the evidence shows that the said statements were false and did not contain a true statement as to the condition of said bank, and the defendant directors knew at the time said statements were published that the same had not been authorized by the board of directors of said bank, and knew that the same was the individual act of said directors so signing and publishing said statements, and they knew that said statements were designed for publication, and were intended for the public, and that said statements were seen and relied upon by the plaintiff before making his said deposit, and that the defendants knew that they had no personal knowledge as to whether said statements were true or false, and that said statements were materially false, and that said bank was then in an insolvent condition instead of a sound condition, then said statements were made and published scien-

ter, and the plaintiff is entitled to recover such damages as the evidence may show that he has sustained in consequence thereof."

These declarations of law the court refused to give, to which action of the court in refusing to give each of said declarations of law the plaintiff then and there excepted.

The court thereupon rendered a judgment upon the referee's report for the defendants, in words and figures as follows: "Now, at this day come again the parties, by their respective attorneys, and the exceptions heretofore filed by ²⁵⁷ defendants to the report of Hon. Charles W. Sloan, referee, and this cause having been argued and submitted at the last term, and taken under advisement, and the court, being now fully advised of and concerning the premises, doth find from the report that the referee did determine as a fact and report that defendants did not have knowledge of the insolvency of the Citizens' Stock Bank, or of its failing condition or circumstances, at the times of the making of the deposit and the creation of the debts sued for in plaintiff's petition; and the court doth further find from said report that the referee determined and reported as a fact the various statements of the condition of the said Citizens' Stock Bank, signed by the defendants, were made by them without any knowledge or information that the same were untrue, but were made in the honest belief that said statements and representations of the condition of said bank set out and referred to in the petition were true, and that said statements and representations were made by defendants in good faith, and in reliance upon the assurances of the cashier of said bank that it was always prospering, and in reliance upon the facts furnished to them as to the financial condition of the said bank by the cashier in charge of its books; and the court, being satisfied that said finding of fact, as above set out, was proper and correct, upon the evidence reported by the referee, doth now sustain exceptions numbered 1, 3, 4, 15, 17, 18, 19, 20, 21, 22, 25, and 26 filed by the defendants to the report of the referee, and doth now overrule all other exceptions filed by defendants to said report; and the court doth hold and determine as a matter of law, upon the facts reported by said referee, that the plaintiff is not entitled to recover upon either count of the petition, and doth therefore find the issues for the defendants upon all the counts of the petition. Wherefore it is considered by the court that the plaintiff take nothing by his said writ, and that defendants go hence without day, and that they have

and recover of plaintiff ²⁵⁸ their costs and half laid out and expended, and that execution

In proper time the plaintiff filed a motion which being overruled, he filed a bill of exceptions. In the abstract of the record it is stated that the evidence the referee tended to support his findings of fact. The exceptions did not preserve any of the evidence notwithstanding the defendants insisted upon being embodied in full therein. So that this case is now before the court on the pleadings, the report of the referee, and the instructions asked by the plaintiff. Judgment of the court on the referee's report.

Of the exceptions sustained, the fifteenth and sixteenth are based upon the weight of the evidence, and the trial court as to them will not be reviewed. 1. Because it is the settled practice of this court not to review conflicting evidence, nor to review the ruling of the trial court on such evidence; and 2. Because if this were not so, there is no evidence before the court. The ruling of the trial court must therefore be sustained in this regard, that the suspicions of the defendants were aroused by the character and kinds of the business of the debtors of the bank to such an extent that they were upon inquiry, and by the proper discharge of their duty, could have discovered the insolvency of the bank, and the statements made by the defendants to the secretaries were not intended to induce the plaintiff to deposit in the bank.

This leaves two questions of law in this case, the first is, whether an action under section 2760 of the Revised Statutes by a depositor against the directors of a bank, who receive deposits after they have knowledge that the bank is insolvent or in failing circumstances, are such directors individually responsible for such deposits, unless it appears from the whole case, that they had actual knowledge ²⁵⁹ of the condition of the bank, in that they could have ascertained its condition if they had not neglected to do so, or keep posted as to the affairs of the bank, and are charged by law with the duty of managing the business of the bank that they are charged with knowledge, and are not to plead ignorance of its condition? And 2. Are such directors of a bank liable to depositors, in a common-law action

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statements made to the secretary of state, required by section 2752 of the Revised Statutes of 1889, which were not true, and which they honestly believed were true, and which were in good faith based upon details furnished to them by the cashier of the bank, whose reputation was good? These questions will be treated in their order.

1. The first proposition necessitates a short retrospect of the law. The relation of a depositor to a bank is that of ordinary debtor and creditor. "The relation between the creditors and the corporation is that of contract, and not of trust": *Briggs v. Spaulding*, 141 U. S. 132, followed in *Union Nat. Bank v. Hill*, 148 Mo. 396, 71 Am. St. Rep. 615. "But there is nothing, of either contract or trust, in all ordinary cases, to create any relation between the creditor and the directors": *Briggs v. Spaulding*, 141 U. S. 132; *Union Nat. Bank v. Hill*, 148 Mo. 396, 71 Am. St. Rep. 615. Accordingly, it was held in *Union Nat. Bank v. Hill*, 148 Mo. 396, 71 Am. St. Rep. 615, which was a suit by the creditors of the same bank against these same defendants to recover the deposits lost by the creditors by reason of the negligence of the defendants in managing the affairs of the bank, that there could be no recovery by depositors against directors of a bank because of the negligence of the directors in managing the affairs of the bank; that the directors are liable for negligent performance of duty to the bank, or to its assignee, or to a receiver thereof, but not to the creditors, because of want of privity of contract between them. So, also, in *Fusz v. Spaunhorst*, 67 Mo. 265, the same doctrine was announced by this court, through Sherwood, J., and it was further pointed out that, aside from the statutory liability, directors were not individually to depositors for mere nonfeasance; that "nothing short of active participancy in a positively wrongful act intended and directly operating injuriously to the prejudice of the party complaining, will give origin to individual liability"; that the injury must be "occasioned by the malicious or fraudulent act of the party complained of."

The case last referred to was an action by depositors against directors of a bank, and was based upon section 27 of article 12 of the constitution of Missouri, which is as follows: "Sec. 27. It shall be a crime, the nature and punishment of which shall be prescribed by law, for any president, director, manager, cashier, or other officer of any banking institution to assent to the reception of deposits, or the creation of debts by such bank."

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ing institution, after he shall have had knowledge of the fact that it is insolvent or in failing circumstances; and any such officer, agent, or manager shall be individually responsible for such deposits so received, and all such debts so created with his assent." It was held that this section of the constitution was not self-enforcing, and that, as no statute had been passed carrying it into effect, there was no statutory liability of directors of a bank to its depositors, and as there was no such liability except upon the grounds pointed out, at common law the defendants were not liable at all.

By the act of May 15, 1877, the general assembly amended the law as to banks: Laws 1877, p. 28. Section 21 of that act was as follows: "No president, director, manager, cashier, or other officer or agent of any bank organized and doing business under the provisions of this act, or any law of this state, shall receive or consent to the reception of deposits or create or consent to the creation of any indebtedness after becoming aware that such association is insolvent or in failing circumstances. Every person violating the provisions of this section shall be individually responsible for such deposits so received and all such debts so contracted," etc. Then ²⁶¹ follow provisions allowing contribution to be recovered by one director from another, which are omitted, because not material here.

At the same session the general assembly, by an act approved April 18, 1877 (Acts 1877, p. 239), amended chapter 201, relating to crimes, by adding a new section thereto, as follows: "If any president, director, manager, cashier, or other officer of any banking institution doing business in this state shall receive or assent to the reception of any deposit of money or other valuable thing in such bank or banking institution, or if any such officer or agent shall create or assent to the creation of any debts or indebtedness by such bank or banking institution, in consideration, or by reason of which indebtedness any money or valuable property shall be received into such bank or banking institution after he shall have had knowledge of the fact that it is insolvent or in failing circumstances, he shall be deemed guilty of larceny, and upon conviction thereof shall be punished in the manner and to the same extent as is provided by law for stealing the same amount of money deposited, or valuable thing, if loss occur by reason of such deposit."

The act of May 15, 1877, relating to civil liability, was amended by changing the words "after becoming aware" to the words "after he shall have had knowledge of the fact,"

and was carried into the revision of 1879, with an amendment as to contributions not material here, and became section 918, article 7, chapter 21. The act of April 23, 1877 (Laws 1877, pp. 35, 36), now section 2761 of the Revised Statutes of 1889, makes the insolvency or failing circumstances of the bank prima facie evidence of the knowledge and assent of the directors.

The act of April 18, 1877, relating to criminal liability, was carried into the revision of 1879, and became section 1350, article 3, chapter 24, but it was amended by that revision by adding thereto the following proviso: "Provided, that the failure of any such bank or banking institution shall ~~be~~ be prima facie evidence of knowledge on the part of any such officer or person that the same was insolvent or in failing circumstances when the money or property was received on deposit."

The act of 1887 (Laws 1887, p. 162) extended the criminal law so as to apply to private banks. The provision as to civil liability was carried into the Revised Statutes of 1889 without any change whatever. The provision as to criminal liability (being section 1350 of the Revised Statutes of 1879, as amended by the act of 1887) was carried into the revision of 1889 without change, and appears as section 3581 thereof.

Thus we see that, so far as civil liability is concerned, the only change material to this inquiry that has been made in the law since the two acts of 1877 were passed was to strike out the words "after becoming aware," and to substitute the words "after he shall have had knowledge of the fact" that the bank is insolvent or in failing circumstances; thereby using the same words that are employed in the constitution and in the criminal statute, and that the criminal statute makes the failure of the bank prima facie evidence of knowledge on the part of any officer that the bank was insolvent or in failing circumstances when the deposit was received, while the civil statute makes the insolvency or failing circumstances of the bank prima facie evidence of the knowledge and assent of the directors.

State v. Darrah, 152 Mo. 522, was a criminal prosecution, under section 3581, against the president of a bank for receiving deposits after he had knowledge that the bank was insolvent or in failing circumstances, and it was held error to refuse an instruction which declared the law to be that, notwithstanding the failure of the bank was prima facie evidence of such knowledge, still the burden of proof was not changed

by the statute, but that the defendant could show the condition of the bank and circumstances tending to exonerate him from criminal liability, and then, on the whole case, the burden of proof would still rest on the state; and the same is true ²⁶³ as to proceedings under the civil statute. This decision disposes of the plaintiff's claim that the defendants are estopped from showing want of knowledge because it is their duty under the law to know.

If anything further were needed to be said as to this contention, it would be sufficient to add that the statute only makes the failure of the bank *prima facie* knowledge of insolvency, whereas if the defendants are estopped to deny knowledge because it was their duty to know, or because if they had not been negligent they would not have been ignorant, then the failure of the bank would necessarily be conclusive knowledge of insolvency, and if this were true, there would be no defense to a suit of this character or to a criminal prosecution. It would be enough to prove the deposit and the failure of the bank, and the court would have to instruct the jury to return a verdict for the plaintiff. This would make directors and officers of a bank guarantors to the depositors of all money deposited in the bank. The history of the law, its language, and the prior decisions of this court demonstrate that neither the framers of the constitution nor the law-makers ever intended to provide for any such revolution in the liability of directors of a bank. The law is drastic and penal, but it does not cut off all defense. It was intended to reach and punish the guilty, not to ruin and disgrace the honest directors, who acted in perfect good faith and without guilty knowledge. Such a construction as is here contended for would shut the doors of every bank in the state, because honest and responsible directors would not serve as such officers, and thereby incur liabilities and penalties far beyond what the law imposes on them in similar relations to all other corporations, or else a far worse condition than closing the banks would be brought about, for irresponsible and conscienceless persons could alone be induced to accept directorships or offices in banks, intending to "make hay while the sun shone," and when the crash came take a change of venue ²⁶⁴ to some other jurisdiction, where the extradition laws do not apply.

The liability of directors under the criminal law must be regarded as settled by *State v. Darrah*, 152 Mo. 522. The civil

and criminal statutes, though passed as separate acts, were passed at the same session of the general assembly, and were both enacted to carry into effect the provisions of section 27, article 12, of the constitution, which provides for a criminal and civil liability both, and therefore these acts may be, and should be, read together, and a judicial construction of one applies with equal force to similar provisions of the other. The constitution and the acts require that, to subject a director or officer to the pain and penalties denounced, "he shall have had knowledge of the fact that it is insolvent or in failing circumstances," when he assented to the receipt of the deposit. The word "knowledge" here employed must be taken in its common acceptation; that is, in the plain or ordinary meaning and usual sense of the word: *State v. Jones*, 102 Mo. 305; *Warren v. Barber etc. Paving Co.*, 115 Mo. 572; *State v. Marion County Court*, 128 Mo. 427. It ought to be so construed that no man who is innocent can be punished or endangered: *State v. McLain*, 49 Mo. App. 398; 9 Bacon's Abridgment, 255. So treated, we may properly look to the source to which men generally apply for the meaning of the word "knowledge." Webster's Dictionary defines "knowledge": "1. The certain perception of truth; belief which amounts to, or results in, moral certainty; indubitable apprehension. 5. Information; intelligence; as, 'to have knowledge of a fact.' " The knowledge which the law requires that a director shall have had means a guilty knowledge, not an innocent, bona fide, ignorance arising from neglect to keep posted or to inquire. It must be construed to have been intended as a sword with which to punish the guilty, and a shield to protect the innocent. If this had not been the intention, the liability would have been made absolute and unqualified, instead of dependent upon knowledge. The framers²⁸⁵ of the organic and of the statute law must be held to have understood how the business of a bank is conducted. They must have known that the directors are drawn from the busiest men in the community; men who have carved success out of chaos, who have succeeded where the great multitude has failed; men who are not expected and could not afford to give their whole time to the business of the bank. The law-makers knew that the active management of a bank usually devolves upon the president and cashier, and that to the latter is usually intrusted the management of the details. They knew that few directors had the time, and fewer still the capacity, to examine the books of a bank and ascertain its solvency; that even in

their own business they could not take off a trial balance from the books they employed experts to keep for them, either because they had not the time to do so for themselves, or because they did not have the capacity to do so. The law imposes a liability on directors of a bank which directors of no other corporation are subject to. It is a liability which is not limited to any specific amount; it is as broad as the wrongdoing—the fraud—of the director. It is a personal liability for every cent a depositor lost which a director consented to have deposited in the bank after the director shall have had knowledge of the insolvency of the bank or that it was in failing circumstances. It is an unlimited liability, but it is not an absolute one. It is qualified by a condition, the existence or nonexistence of which may make the director liable for the total amount lost by the depositor or may not make him liable for a cent thereof. The liability is measured by the knowledge. As was said in *Fusz v. Spaunhorst*, 67 Mo. 264, the directors are not liable to the depositors, “unless the injury were occasioned by the malicious or fraudulent act of the party complained of; mere nonfeasance will not answer.” So it is that the plaintiff in a suit of this character must allege a fraud committed by the defendant—a willful act done—in order to hold the defendant liable, and, having alleged a fraud, the burden rests on the ²⁰⁶ plaintiff to prove it. And as was aptly stated by Black, J., in *Van Raalte v. Harrington*, 101 Mo. 610, 20 Am. St. Rep. 626: “It is one thing to say knowledge may be inferred from facts and circumstances sufficient to put a person upon inquiry, . . . but it is a different thing to say such circumstances are, as a matter of law, knowledge.” In this case there is no pretense that the defendants had actual knowledge, and the judgment of the trial court finds the fact to be, not only that they had no knowledge, but also that their suspicions were not even aroused to such an extent as would have put a prudent man on inquiry. The judgment of the circuit court in this regard is this: “And the court doth further find from said report that the referee determined and reported as a fact the various statements of the condition of the said Citizens’ Stock Bank, signed by the defendants, were made by them without any knowledge or information that the same were untrue, but were made in the honest belief that said statements and representations of the condition of said bank, set out and referred to in the petition, were true, and that said statements and representations were made by defendants in good faith, and in reliance upon

the assurances of the cashier of said bank that it was always prospering, and in reliance upon the facts furnished to them as to the financial condition of the said bank by the cashier in charge of its books, and the court being satisfied that said findings of fact, as above set out, was proper and correct upon the evidence reported by the referee," etc. In the case of *Union Nat. Bank v. Hill*, 148 Mo. 396, 71 Am. St. Rep. 615, this court held that they were not liable in a suit by creditors for negligence in the management of the affairs of the bank. But one conclusion can be drawn from these conditions, and that is that the judgment of the circuit court on the first count of the petition is right.

This conclusion is in harmony with adjudications upon analogous statutes in other jurisdictions. *State v. Tomblin*, 57 Kan. 841, was a criminal prosecution, under the statute of Kansas, against the defendant, charging that as president, ²⁰⁷ director, and managing officer of the bank he "received deposits of money when the bank was insolvent, knowing that it was in that condition." The supreme court of Kansas said: "While the instructions fairly state the law in the main, the concluding paragraph of the fourteenth instruction given seems to imply that the defendant might be held guilty in a criminal prosecution if, through his negligence, he did not know the actual condition of the bank when it was in fact insolvent. It was proper for the jury to take into consideration the defendant's relation to the bank as a managing officer, and the duties he owed to it, for the purpose of determining whether he actually knew its insolvent condition; but mere negligence would not render him guilty of a crime. It was incumbent upon the state to establish, not only the fact of insolvency, but the defendant's knowledge of it." *Minton v. Stahlman*, 96 Tenn. 98, was an action by a depositor against the officers and directors of a bank to recover a deposit received when the bank was alleged to be insolvent, and lost by the subsequent failure of the bank. The declaration alleged that defendants were officers of the bank, "and having due notice and knowledge of such facts and circumstances as by ordinary diligence and business skill would have shown them its true financial condition, which was that of insolvency, and having reason and cause to know that anyone depositing money and evidences of debt therein for collection was liable to lose the money so deposited or collected by reason of its insolvency, . . . did continue to keep open and operate the

same as a bank, and invite the custom and patronage of plaintiff and others, and that plaintiff being induced thereby, and deceived and misled by such wrongful act of defendants," deposited his money, and lost it. The defendants demurred to this charge, on the ground that "they are not liable, as directors of the Bank of Commerce, for receiving deposits when they merely had notice or knowledge of facts and circumstances which, by use of ordinary diligence and business ²⁶⁸ skill, would have shown the said Bank of Commerce to be insolvent. In order to be liable, it must appear that they knew the said bank to be insolvent and willfully and knowingly received the deposits." The statute of Tennessee provides: "And if any director or directors of any of the banks of this state shall be guilty of any fraud or willful mismanagement of the affairs of such bank by which any loss shall be occasioned to its creditors, such director or directors, upon legal ascertainment of the facts, shall be individually liable for such loss." The supreme court quoted and followed the decision of this court in *Fusz v. Spaunhorst*, 67 Mo. 264, and said: "It was held by this court in *Hume v. Commercial Bank*, 9 Lea, 728, that 'this section provides for a case of intentional fraud and willful mismanagement.' It is not tantamount to a charge of intentional fraud or willful mismanagement to allege that 'having due notice and knowledge of such facts and circumstances as, by ordinary diligence and business skill, would have shown them its true financial condition, which was that of insolvency.' This, at most, is a charge of negligence and inattention; whereas there is no liability to creditors or depositors, under this statute, without fraud or willful mismanagement."

Deaderick v. Bank, 100 Tenn. 457, was a bill by depositors against directors of a bank for the loss of their deposits by the failure of the bank, which is alleged to have occurred by the fraud, gross neglect, and willful mismanagement of the directors "in permitting and sanctioning certain loans to insolvent parties, without proper security, whereby the bank was wrecked." The action was based on the statute of Tennessee above set out. The facts in that case and in the case at bar bear so striking a similitude that it is worthy of more than a passing reference. There a son of one of the directors was the cashier. The case was referred to a referee, who reported in favor of the plaintiffs, and held the directors liable, and the chancellor entered a decree accordingly. The court of chancery appeals reversed that finding ²⁶⁹ and discharged the de-

fendants. The case was appealed to the supreme court, where, referring to the decision of the appellate court, it was said: "Continuing, that court says: 'It is manifest, from the evidence, that in the first year of this bank's existence its directory paid but little attention to its affairs. The Duncans seem to have dominated. W. M. Duncan was believed to be, and from the record was, then, a man of large means, and he was allowed free access in obtaining loans from the funds of the bank to carry on his speculations and enterprises. While this is true, it is equally true that the other directors in the bank believed with great confidence that he approached the condition financially of a semi-millionaire, and that he was good for all his engagements. It appears, however, that in the larger or higher banking circles of the city, in 1891, his credit began to wane, but with his own bank people it was unquestioned until several months of 1892 had passed.' Concluding on this point, the court of chancery appeals say: 'We find much evidence in the record that the loans specifically reported by the special commissioner and made the basis of the chancellor's decree were imprudent, and made without that care, caution, and prudence which is ordinarily supposed to govern the action of the prudent business man.' But, while this is so, they again say: 'We have been unable to discover any proof which, with its fair and legitimate inferences, leads to the belief that appellants are chargeable, as directors, with fraud, or any willful mismanagement of their directory trust, in connection with the renewal or continuance of the loans.' Upon this finding by the court of chancery appeals it is clear that, in so far as complainants rest their right to recover upon the statutory liability of these directors to them as creditors of this bank, their bill must fail."

Patterson v. Minnesota Mfg. Co. (Minn., June 18, 1882), 4 L. R. Ann. 745, was a suit by a creditor against a director of a manufacturing company based upon a violation of the statute of Minnesota, ²⁷⁰ which provided: "If any corporation organized and established under the authority of this act shall violate any of its provisions, and shall thereby become insolvent, the directors ordering or assenting to such violation shall be jointly and severally liable in an action founded on this statute for all debts contracted after such violation as aforesaid." The officers, by authority of the directors, loaned its credit by making and indorsing accommodation paper, in consequence of which the company failed, and this was the violation of the statute upon which the plaintiff predicated a right to recover.

The supreme court said: "Plaintiff's contention is that it is the duty of a director to know what is being done in corporate matters; that it is negligence for him not to know; and therefore he is conclusively presumed to have known, and, not objecting, he must be deemed assenting. Such a construction would impose this severe statutory liability for at least every act of mere negligence for which he would be liable at common law; but as the act is highly penal, we do not think it ought to receive so broad a construction. The language of the various sections all tends to indicate that the legislature intended that something more than mere negligence should be necessary to subject a person to those heavy penalties—something amounting to willful, or, at least, intentional, violation of legal duty, either ordering the act done, participating in doing it, or assenting to its being done with knowledge that it was being or about to be done."

Other cases might be added, but the principles would not be more clearly enunciated by a multiplication of precedents. Of course, it must not be understood that it is intended to be held that a director can shut his eyes to facts, circumstances, and conditions, and then say he did not know what he must have seen if he had used his senses; for such conduct would be fraudulent and willful disregard of duty. No such condition is presented by this record. The defendants were negligent, but they acted in good faith, were innocent of wrongdoing, ²⁷¹ and hence are not to be charged as if they had acted with knowledge, and therefore were guilty of fraud. They were guilty of nonfeasance, but not of misfeasance; of negligent omission of duty, but not of fraudulent commission of wrong. It follows that the first proposition must be decided in favor of the defendants, and that the judgment of the circuit court that a case against them, under section 2760 of the Revised Statutes of 1889, had not been made out by the proof, is right.

2. The second proposition is, Are directors of a bank liable to depositors, in a common-law action for deceit, for statements made to the secretary of state, required by section 2752 of the Revised Statutes of 1889, which were not true, but which they honestly believed were true, and which were, in good faith, based upon details furnished to them by the cashier of the bank, whose reputation was good?

The decision of this court in *Fusz v. Spaunhorst*, 67 Mo. 264, that, "Aside from statutory provisions or one of similar

nature in the organic law, the directors or officers of an incorporated bank would not be individually responsible in an action at law for injury resulting to a creditor or depositor, unless the injury were occasioned by the malicious or fraudulent act of the party complained of. Mere nonfeasance will not answer. Nothing short of active participancy in a positively wrongful act, intendedly and directly operating injuriously to the prejudice of the party complaining, will give origin to individual liability as above indicated"—must be taken as the major premise of the syllogism by which this proposition is solvable. And the duty of directors of a bank, under the law, in making statements to the secretary of state, is the minor premise. Section 10 of the act of 1877 (Laws 1877, page 30, now section 2751 of the Revised Statutes of 1889) made it the duty of every banking corporation to furnish to the secretary of state, when required by him, a statement verified by the president and cashier, and attested by three directors, "of the actual condition of such corporation at the close of business on ²⁷² the day designated, and which day shall be prior to such call." Section 10 of the act (now section 2752) also prescribed the form of the statement. Section 11 of the act (now section 2753) required the statement to be published in one or more daily newspapers published in the city or county where the bank was located, or in such a weekly paper if there was no such daily, and a copy to be posted in the banking house accessible to all. Section 12 of the act (now section 2754) made it the duty of the secretary of state to call for such a statement not less than twice each year, and provided that "the secretary shall give no notice to any person whomsoever of the day on which he will call for such statement." For a violation of his duty the secretary of state was subject to removal from office and a fine of not less than \$500. The act then provided: "And should any president or secretary of any such corporation, or any director thereof, refuse to make the statement so required of them, or shall willfully and corruptly make a false statement, they, and each of them, shall be deemed guilty of a misdemeanor, and upon conviction thereof, upon information or indictment, shall be punished by a fine for each offense, not exceeding \$500 and not less than \$100, or by imprisonment not less than one nor more than twelve months in the city or county jail, or by both such fine and imprisonment." The statute which created the duty of making these statements to the secretary of state, therefore, denounced the

penalty for refusing to perform the duty, and also prescribed the punishment, if the statement was willfully or corruptly false. Under this condition of the law, can it be said that any other liability or penalty can be applied than that the law itself imposes? Can it be that in this way the common-law action of deceit has been enlarged by statute? Or can it be maintained that this statute overcomes the nonliability declared in the case of *Fusz v. Spaunhorst*, 67 Mo. 264? The first canon of construction of a statute law is that "an affirmative enactment of a new rule implies a negative ²⁷³ of whatever is not included or is different, and, if by the language used a thing is limited to be done in a particular form or manner, it includes a negative that it shall not be done otherwise": *Ex parte Joffe*, 46 Mo. App. 360; *Sutherland on Statutory Construction*, sec. 140; *Wells v. Supervisors*, 102 U. S. 625. *Sutherland on Statutory Construction*, section 208, lays down the rule: "When a law imposes a punishment which acts upon the offender alone, and not as a reparation to the party injured, and where it is entirely within the discretion of the law-giver, it will not be presumed that he intended that it should extend further than is expressed; and humanity would require that it should be so limited in construction." *Sedgwick on Statutory and Constitutional Law*, second edition, page 341 et seq., points out that, "where a precise remedy for the violation of a right is provided by statute, it often becomes a matter of interest to know whether the statutory remedy is the only one that can be had, or whether it is to be regarded as merely cumulative, the party aggrieved having also a right to resort to his redress for the injury sustained at common law, or independently of the statute. In regard to this we have already noticed the rule that where a statute does not vest a right in a person, but only prohibits the doing of some act under a penalty, in such a case the party violating the statute is liable to the penalty only; but that where a right of property is vested by virtue of the statute, it may be vindicated by the common law, unless the statute confines the remedy to the penalty." And again, at page 343, the same author says: "But, on the other hand, it is a rule of great importance and frequently acted upon, that where by a statute a new right is given and a specific remedy provided, or a new power and also the means of executing it are provided by statute, the power can be executed and the right indicated in no other way than that prescribed by the statute." *Endlich on Interpretation of Statutes*, section 465, says: "If the statute

which creates the obligation, whether public or private, provides in the same section or passage a specific ²⁷⁴ means or procedure for enforcing it, no other course than that thus provided for can be resorted to for that purpose." This has been the rule followed in Missouri ever since the case of *Riddick v. Governor*, 1 Mo. 147, where it was said: "It is an incontrovertible maxim of law that a statute imposing a penalty for a new created offense, or for a breach of duty, and defining the particular mode in which and before what tribunal the penalty shall be recoverable, must be strictly pursued." And then, pointing out that the act under consideration imposed a new duty upon sheriffs and imposed a penalty for its violation and prescribed the method of enforcement to be pursued and the tribunal to try the cause, the court said: "We are at once led to the conclusion that they [the law-makers] intended to provide, specifically, an adequate remedy for the neglect of each particular duty thereby created, and a different construction would subject the sheriff to a liability which we cannot reasonably suppose he ever intended to incur." This rule is recognized and approved in *Ellis v. Whitlock*, 10 Mo. 781; *State v. Canton*, 43 Mo. 51; *Moore v. White*, 45 Mo. 206. So, on the same principle, it was said by Norton, J., in *Parish v. Missouri etc. R. R. Co.*, 63 Mo. 286: "So far as the law is to be regarded as punitive, it should be strictly construed, and so as not to enlarge the liability it imposes, nor allow a recovery unless the party seeking it brings his case strictly within the terms or conditions authorizing it. So far as it is to be considered as compensatory for an injury done, it is to be construed as any other statute." This question is set at rest, however, in *People's Ry. Co. v. Grand Ave. Ry. Co.*, 149 Mo. 253.

Applying these rules to the case at bar, we have this result: Before the enactment of this statute there was no obligation on directors or officers of a bank to make any kind of a statement of the actual condition of the bank to the secretary of state or to anyone else, nor to publish any such statement in the newspapers. The obligation and duty so to ²⁷⁵ do was created by the statute. The same act which imposed the duty prescribed the penalty for its violation and the tribunal before which the penalty could be enforced; that is, made it a misdemeanor, punishable, on information or indictment, by fine and imprisonment. The conclusion is inevitable and unavoidable that no other penalty can be exacted or enforced than that prescribed by the act. Nor can a false statement made by di-

rectors of a bank to the secretary of state be made the basis of a common-law action for deceit. The reason is plain. The law exacts the statement; hence it is not voluntarily made. The statement is required to be made to the secretary of state, so that he may take steps to close the bank if it is dangerous to the welfare of the people for it to continue business, but it is in no sense a statement made by the directors with intent to induce persons to deposit their money in the bank, and therefore a common-law action of deceit cannot be predicated upon it. But, above all, the law imposes the duty and prescribes the punishment for a violation thereof. The law vests no right of property or of action in anyone which may be vindicated by the common law, and therefore the penalty imposed by the law is exclusive, and no other remedy is open to anyone.

Proceeding along different lines the courts of other jurisdictions have reached the same result as to the liability of a bank director in a common-law action of deceit for false statements as to the condition of the bank, where the duty to make such a statement was or was not imposed and the penalty prescribed for a violation of such duty. The principle upon which the directors have been held liable in those cases is that they knew the statement to be false, not merely that they might, by ordinary care, have known that fact, and that, if they acted in making such statements in good faith, upon details furnished by the ordinary managers and clerks whom they have employed, they cannot be held liable in a common-law action of ²⁷⁶deceit: *Pierratt v. Young* (Ky., March 7, 1899), 49 S. W. Rep. 964; *Cowley v. Smyth*, 46 N. J. L. 380, 50 Am. Rep. 432; 1 Cook on Stock and Stockholders, 3d ed., sec. 158. By this, however, it must not be understood that no action for deceit will lie against a director of a corporation, banking or otherwise (there is no difference), who has made false and fraudulent representations as to the condition of the corporation, whereby others have been misled and damaged. Such misrepresentations need not be personally made, but may consist of voluntary reports or prospectuses which are false, and made fraudulently, and published or circulated: 1 Morawetz on Private Corporations, 2d ed., sec. 573. But this rule cannot be invoked in this case, for all evidence of this kind was withdrawn by the plaintiff, so the referee reports, and the right of recovery was placed squarely upon the reports made to the secretary of state. For these reasons the circuit court was

right in entering judgment for the defendants on the deceit count of the petition.

3. It is urged, however, that the circuit court had no power to set aside the findings of fact by the referee and make findings itself, but that it must accept the report as to matters of fact, or else set it aside, as in cases at law with reference to the verdict of a jury. This contention finds support in *Lingenfelder v. Wainwright Brewing Co.*, 103 Mo. 589. But in that case both sides conceded and contended that such was the law, and the court treated the case as counsel had done. But in *Wentzville Tobacco Co. v. Walker*, 123 Mo. 671, the question was contested and decided. There it was held: "In causes wherein the court may lawfully direct a compulsory reference, it may likewise act upon the evidence reported by the referee, and find therefrom different conclusions of fact from those reported by the referee. This should now be taken as settled law, under the rulings in *Caruth-Byrnes Hardware Co. v. Wolter*, 91 Mo. 484, and *State v. Hurlstone*, 92 Mo. 327, without reopening the question they adjudged. It was hence entirely competent for the trial court, in the case at bar, to set aside ²⁷⁷ the finding of the referee in favor of plaintiff, and then to find for the defendants upon the evidence reported by the referee." This is the true rule; for while this court on appeal has always treated the report of a referee as a special verdict, and refused to disturb it if there was substantial evidence to support it (*Berthold v. O'Hara*, 121 Mo. 97), still the power of the circuit court is very different; for in such cases, a jury being waived, the case is triable before the court, and because the court has not the time to try such cases it calls in the aid of a referee to take the testimony. The referee's power is limited to recommending a judgment. The duty and responsibility as to the judgment rests upon the court. The referee can aid, but not bind, the judge. And with all the evidence before the court, it would be a useless and expensive proceeding to refer the case to the same or another referee; for, perchance, the referee would find the facts the same way again, and so the expensive luxury would have to be repeated until some referee could be found who would find the facts as the judge all the while believed they should be found, and as he could and should have found them upon the coming in of the first report. After full investigation and this protracted discussion, no error has been found in the action of the trial court, and its judgment is therefore affirmed.

All concur, except Robinson, J., absent.

THE RELATION BETWEEN A BANK AND ITS DEPOSITOR is that of debtor and creditor: *Harter v. Mechanics' Nat. Bank*, 63 N. J. L. 578, 76 Am. St. Rep. 224; with nothing in the nature of a trust or fiduciary character in or growing out of the transaction: *Leaphart v. Commercial Bank*, 45 S. C. 563, 55 Am. St. Rep. 800.

BANKS—FALSE STATEMENTS OF CONDITION.—The directors of a bank are personally liable for a loss caused to a depositor by their false statements of the condition of the bank, published by their authority, when they knew, or with reasonable care might have known, them to be false. They are liable when they did not know the statements to be true, as well as when they knew them to be false: *Solomon v. Bates*, 118 N. C. 311, 54 Am. St. Rep. 725.

INSOLVENT BANK—DIRECTORS' LIABILITY.—The directors of a bank are conclusively presumed to know its condition. It is their duty to know whether it is insolvent, and it is fraudulent in them to put forth official statements that the bank is solvent when they do not know the same to be true; and they are liable to those who are deceived thereby into having dealings with the bank, or making deposits therein for losses sustained: *Tate v. Bates*, 118 N. C. 287, 54 Am. St. Rep. 719. See, further, *Corn Exchange Nat. Bank v. Solicitors' etc. Co.*, 188 Pa. St. 330, 68 Am. St. Rep. 872; *Grant v. Walsh*, 145 N. Y. 592, 45 Am. St. Rep. 626.

REFEREE'S FINDINGS.—A JUDGMENT RENDERED on the findings of a referee must stand, though some of his findings may have been set aside, if there is no error in applying the law to those remaining: *Little Pittsburg etc. Co. v. Little Chief etc. Co.*, 11 Colo. 223, 7 Am. St. Rep. 226.

NORDYKE & MARMON COMPANY v. KEHLOR.

[155 Missouri, 643.]

CONTRACTS—MISTAKE—IMPOSSIBLE CONDITION.—If a person contracts to construct and furnish a flouring-mill that will produce a result measured by a certain standard assumed by both parties to exist, when in fact no such standard does or can exist, the contract is impossible of fulfillment and unenforceable.

CONTRACTS—MISTAKE.—If an attempted contract assumes the existence of, and is based upon the existence of, an essential fact which does not exist, there is no meeting of the minds of the parties in reality, and no contract that can be enforced by either.

CONTRACTS—MISTAKE—IMPOSSIBLE CONDITION.—If by mutual mistake a contract is founded upon a condition impossible of performance because of the assumption of the existence of a fact which cannot exist, and its adoption by both parties as the sole standard by which to test the performance of the condition, the contract cannot be enforced, and it is immaterial who furnished the information upon which the condition is predicated, or that the person pleading the mistake had the means of discovering it, or by care and diligence might have avoided it.

CONTRACTS—INTENTION—DOUBTFUL TERMS.—The circumstances under which a contract is made and the object in view must be considered in giving meaning to its doubtful terms.

CONTRACTS — MISTAKE — IMPOSSIBLE CONDITION—QUANTUM MERUIT—ABANDONMENT.—If by mutual mistake a contract is founded upon a condition impossible of performance, one of the parties, upon discovering that fact, is not compelled to proceed with his part of the contract and trust to a recovery on a quantum meruit for his services. Upon such discovery he may abandon the contract.

CONTRACTS—QUANTUM MERUIT.—If labor and materials are furnished by request and no price is agreed upon, the law implies an agreement to pay the reasonable value thereof, but if the parties have by express agreement fixed the amount to be paid upon the completion and fulfillment of the contract, they must be governed thereby, and, in a suit on the contract, a court on quantum meruit cannot avail.

C. H. Krum, for the appellant.

E. W. Pattison, for the respondent.

646 **VALLIANT, J.** Plaintiff is a corporation engaged in manufacturing flouring-mills and defendant is an owner and operator of such mills. Plaintiff sued for the price of certain rolls furnished to defendant for his mills, and defendant answered with a counterclaim. The cause was by consent referred to Arba N. Crane, Esq., to try all the issues. Upon the trial before the referee the plaintiff's cause of action was confessed, but the controversy was over the counterclaim, which controversy is sufficiently stated in the report of the referee as follows:

"Shortly stated, the case is that by its contract plaintiff agreed to furnish a flouring-mill, of a specified description, to be paid for when completed and proved capable of producing flour of a certain percentage. Before anything considerable was done toward performing the contract, the plaintiff abandoned it on the expressed ground that the contract was 647 inoperative, because the basis furnished by it for said percentage test was impossible. Later on the defendant obtained from Allis & Co., of Milwaukee, a flouring-mill, located on the same site.

"The contract in question was entered into and dated May 28, 1892, between the plaintiff, as party of the first part, and the defendant and one E. E. Pierson, parties of the second part. Pierson was a miller residing in Lawrence, Kansas, and operating a flouring-mill in that state. Before this suit was begun he assigned his interest in the contract to defendant Kehlors, whom I will hereafter refer to as the contracting party."

Then continuing the report sets out the contract in haec verba, which, without here copying, it is sufficient to say is to the effect that plaintiff agreed to furnish, within a certain

period, all materials, machinery, etc., and erect "in as proper order as is known to science in the art of milling at the present time, and to deliver to them a flouring-mill with an easy capacity of manufacturing fifteen hundred barrels of flour of all grades as specified hereinafter, combined, in every day of twenty-four hours run," according to specifications, etc. The contract concludes as follows:

"The meaning and intent of the above agreement is as follows: The party of the first part have agreed to build a flouring-mill according to the specifications, etc., furnished by them, and which is guaranteed by them to be as complete and perfect a flouring-mill, as far as construction, durability, and easy working is concerned, as any in the United States, and to make at least the lowest percentage of flour mentioned hereafter as conditions of payment.

"And in consideration of the above, party of the second part agrees to pay for the same when the mill is completed and proved capable of producing not less than sixty per cent of Kansas hard wheat flour, fully equal in quality to the ⁶⁴⁸ best fifty-five per cent that Kelly & Lysle can make in their mill at Leavenworth, Kansas, as now constructed and operated from the same quality of wheat and the same yield which shall not exceed four and one-half bushels to the barrel of flour, the remaining forty per cent to be fully equal to Kelly & Lysle's remaining forty-five per cent in proportion according to grades contained in Kelly & Lysle's remaining forty-five per cent, sixty-five thousand dollars, as follows: Fifteen thousand dollars to be advanced when the machinery is ready for shipment; seventeen thousand dollars to be advanced during the construction of the plant and as it progresses; thirty-two thousand five hundred dollars to be paid upon completion of the plant by the first party as provided above." Then follow promises to pay seventy-five thousand dollars if the mill produces seventy-five per cent equal to Kelly & Lysle's best fifty-five per cent, and to pay eighty-five thousand dollars if it produces ninety per cent equal to Kelly & Lysle's best fifty-five per cent of flour.

Further the report says:

"In his counterclaim the defendant states his view of the terms of the contract, and says that his motive in making it was his obligation to others to build a flouring-mill at Shawnee on land acquired for that purpose. He also alleges his own readiness always to perform his part of the contract and says

that, on the fifth day of July, 1892, the plaintiff definitely refused to perform, and never has performed, its part of the contract. He alleges that the market value of the mill constructed and completed as agreed and conforming to the contract and guaranty would have been one hundred and fifty thousand dollars; that after the plaintiff had refused to perform its contract, defendant tried to get a mill constructed of the same description, but was unable to do so because the plaintiff alone was able to construct the mill on the plan called for by the contract. He lays his damages at eighty-five thousand dollars. The reply of the plaintiff contains a general denial of all the allegations in the counterclaim except such as are specifically admitted by said reply.

"In justification of the refusal of plaintiff to perform the ⁶⁴⁰ contract, it is in substance alleged in the reply that the contract was vitiated by a mistake in basing the flour percentage test on a fifty-five per cent of Kelly & Lysle's manufacture, the fact being that Kelly & Lysle never made, and could not make, flour of that percentage without first making changes in their mill, which, when solicited to do by the parties to this contract, they refused. That this test was put in the contract by the defendant who wanted to make a better flour than Kelly & Lysle; that plaintiff had no knowledge as to the grades of the Kelly & Lysle flour, but was informed by defendant and by Pierson that it was fifty-five per cent best grade. And this the plaintiff believed, or it would not have entered into the contract. When the mistake was discovered and it was found that Kelly & Lysle would not change their mill so as to run a fifty-five per cent grade, plaintiff asked the defendant to modify the contract in this particular of the percentage test, which defendant refused. Whereupon plaintiff declined to go on with the contract. The reply also states that defendant obtained a mill of the like kind, character, and quality with that which plaintiff contracted to build, and that said mill has been erected and is now in operation on the land mentioned in defendant's answer, and is capable of producing not less than fifteen hundred barrels of flour in each twenty-four hours of continuous run.

"Proceeding now with the inquiry in hand, there is no doubt that an error was made in designating in the contract the Kelly & Lysle product as a fifty-five per cent grade of flour, and it is proper to notice how this error happened to occur."

Then follows, in the report, a summary of the evidence on that point, and the evidence to show that Kelly & Lysle had not made and declined to make that percentage of flour. Then the referee says:

"Under date of July 1, 1892, the plaintiff wrote to the defendant that inasmuch as Kelly & Lysle made no fifty-five ⁶⁵⁰ per cent flour the percentage test should be changed, and suggesting a seventy per cent grade of Kelly & Lysle's manufacturing as the standard comparison. To this proposition defendant replied by letter to plaintiff, under date of July 2, 1892, declining to make any change in the percentages. In answer to the latter letter the plaintiff wrote to the defendant under date of July 5, 1892, stating its views of the importance of the percentage test, and saying that 'as you have refused to make any changes in this portion of the contract that would place us in as fair a position as we supposed we were when the contract was signed, we are forced to decline to proceed further with the contract.'

"From the evidence thus briefly summarized I find that the selection of a fifty-five per cent grade of flour of Kelly & Lysle, as the basis for the test of the mill contracted for, was made on information originating with Pierson, and communicated by him to the plaintiff, and that this standard of comparison was insisted upon by the defendant, and was inserted by him in the contract, but was honestly believed by both parties to exist when the contract was signed. That in this belief both parties were in error, and in agreeing and contracting for the percentage test they acted under a mutual mistake of fact.

"This brings me to the consideration of the question whether the mistake under which the parties acted was fatal to the contract.

"Recurring to the testimony, it will be recollected that throughout the negotiations the idea prominent with the defendant was to obtain a mill that would compete with that of Kelly & Lysle. The mill to be built for him must make as good or better flour than Kelly & Lysle was making. I think it no exaggeration to say that this qualification or attribute of the mill to be built was a sine qua non with the defendant. It is therefore evident that to give effect to this purpose, a standard of comparison of the product of the completed ⁶⁵¹ mill with the flour made by Kelly & Lysle was indispensable, and it would seem to follow that if the provisions of the contract are

adequate to effect the purpose mentioned, they are material and essential provisions."

Quoting again that paragraph in the contract hereinabove quoted, in regard to the conditions precedent to payment by defendant, the report continues: "In similar language provision is made for increased pay for the attainment of greater percentages. These provisions are adequate, and, I think, more than adequate, to effect the purpose which the negotiations show that the defendant desired to accomplish, for they not only contain the guaranty of the plaintiff, but they make the defendant's promise to pay for the mill dependent upon the fulfillment by plaintiff of the percentage test based on fifty-five per cent product of Kelly & Lysle. Consequently, when it was found that the test could not be made, the obligation of the defendant to pay for the mill terminated, and inasmuch as the contract to build and the contract to pay for the mill were concurrent considerations, no contract remained that a court could enforce. It seems to me that this consequence clearly shows the importance of this percentage test in the contract, and my belief is that without this test the contract would not have been made."

The conclusion of the referee was that the plaintiff was justified in abandoning the contract and should have judgment on the counterclaim. The report was reviewed by the circuit court on exceptions filed, which exceptions were overruled and the judgment followed accordingly, from which the defendant in due course has prosecuted this appeal.

The report summarizes the evidence on the question of the amount of defendant's damages in case he is entitled to recover, and gives the referee's conclusions thereupon, but the view that we take of the contract in question renders it unnecessary to review that part of the report.

This is an action at law; the plaintiff's reply to the defendant's counterclaim does not seek, as in equity, a rescission or reformation of the alleged contract, but pleads at law that the contract on which the counterclaim is based was in effect no contract; that its own provisions defeated itself; that in aiming to stipulate a degree of excellence and efficiency to which the mill when completed should possess, a standard which it was assumed existed was chosen, by which alone the degree of excellence and efficiency intended to be contracted for was to be tested and proven and the plaintiff's right to recover the contract price demonstrated, but that after the contract was signed

it was discovered that the assumed standard had never existed and could not be obtained, therefore the plaintiff in its plea said the contract was meaningless, and its performance by its own terms, rendered impossible.

It is not charged in the pleadings that fraud was perpetrated or that there was any willful misrepresentation or concealment of a fact by either party, but there was considerable evidence to show who was responsible for the mistake in assuming that the best grade of the output of the Kelly & Lysle mills was a fifty-five percentage, and upon that point the referee found (and the evidence was sufficient to support the finding) that Mr. Pierson furnished the information upon which the contracting parties acted and they all supposed it was true. But in the trial of this issue at law, uninfluenced by any charge of fraud, it is immaterial who gave the information; the contract, speaking for itself, shows that it was assumed as a fact and adopted as the standard by which alone the plaintiff could prove that it had performed its contract and earned the price agreed on.

It is contended in behalf of the defendant that the plaintiff was negligent in not informing itself on this point as it might have done before entering into the contract. That would be a good answer to the plaintiff's plea if the contract was susceptible of performance and its performance when complete was susceptible of demonstration in the absence of ~~the~~ the fact assumed, and if the plaintiff were seeking in equity a rescission of the contract on the ground of mutual mistake, which was the case in *Brown v. Fagan*, 71 Mo. 563, to which appellant refers. But the plaintiff is not seeking equitable relief against a contract susceptible of performance according to its terms, but its contention is that the alleged contract was attempted to be built upon a foundation which did not in fact exist, and therefore the attempt failed.

To appreciate the meaning of the test adopted, we must bear in mind what millers mean by the terms employed in this contract on that point. It seems that every flouring-mill separates its product into two or more grades. Into the first grade it puts its best quality, which is called its "patent flour" and is the best product obtained by that mill from wheat handled by it. What is left of that wheat goes into inferior grades of flour. The skill of the miller is directed to getting the largest percentage compatible with desired excellence, of patent flour out of a given quantity of wheat. All patent flour in the market is not of the same quality. The quality may be in-

fluenced by the percentage of the product the miller sees fit to set apart for that grade. Therefore, if a mill puts only fifty per cent of its product into its patent flour, that flour would be a better quality than if, using the same skill and machinery, the miller put seventy per cent of the product into it.

So that when it was stipulated in this contract that the mill to be constructed by plaintiff should be capable of producing sixty per cent of patent flour equal in quality to that of fifty-five per cent produced by the Kelly & Lysle mills, and that it shall be so proved as a condition to the plaintiff's right to receive the contract price, it is manifest that the parties considered that a very material and essential element in their undertaking.

And if their assumption was well founded, if the Kelly & Lysle mills were producing fifty-five per cent flour and ⁶⁵⁴ plaintiff had performed its contract by producing a mill of the standard degree of excellence stipulated, that fact was susceptible of demonstration in the manner agreed upon. But when it turned out that their assumption was unfounded, they were in the attitude of having contracted with reference to something that did not exist. We cannot conceive that the plaintiff intended to agree to furnish the mill and have his right to recover the contract price depending on an impossible test, nor can we conceive that the defendant in good faith accepted such an obligation. They were both mistaken, and the contract which they intended to establish on that foundation falls when the foundation itself is discovered to have no existence. And in such case it is immaterial that the party pleading the mutual mistake was negligent in seeking information: *Koontz v. Central Nat. Bank*, 51 Mo. 275; *Third Nat. Bank v. Allen*, 59 Mo. 310; *Griffith v. Townley*, 69 Mo. 13, 83 Am. Rep. 476; *Matthews v. Kansas City*, 80 Mo. 235; *Pollock on Contracts*, 412; *Kingston Bank v. Eltinge*, 40 N. Y. 391, 100 Am. Dec. 516.

The learned counsel for the appellant quotes from the supreme court of the United States: "The principle deducible from the authorities is, that if what is agreed to be done is possible and lawful, it must be done. Difficulty or improbability of accomplishing the undertaking will not avail the defendant. It must be shown that the thing cannot by any means be effected. Nothing short of this will excuse nonperformance": *The Harriman*, 9 Wall. 173. And other authorities are cited

in support of the same general principle therein announced, the correctness of which is not questioned.

But was this contract possible of execution? If the Kelly & Lysle mills were producing fifty-five per cent patent flour, it would be no excuse to the plaintiff if, when it had exhausted its utmost skill, it found it had failed to make a mill that would produce a sixty per cent patent flour equal in quality to the Kelly & Lysle fifty-five per cent product, because in such case the law will not recognize that the limit ⁶⁵⁵ in scientific attainment has been reached, and although the achievement promised may be beyond anything that had before been done, yet if the plaintiff saw fit to undertake it and condition its pay on its fulfillment of the promises, the law will give him no relief against his undertaking. But where he contracts to furnish a mill that will produce a result measured by a stated standard assumed to exist, when in fact no such standard did exist, the contract is impossible of fulfillment.

If the defendant, in anticipation of the completion of his mill with a capacity as to quantity and quality to the stipulated test, had contracted to sell one thousand barrels of flour equal in quality to the fifty-five per cent product of the Kelly & Lysle mill, and having, when the time came, tendered that quantity of flour as in fulfillment of his contract, and the purchaser refused it on the ground that it was not of the quality desired, how could the defendant, in a suit to recover for a breach of the contract, prove that the flour tendered was of the quality contracted for? There would be the same inherent infirmity in such contract that there is in the contract now in suit. It is an attempted contract assuming the existence of an essential fact which does not exist, and therefore there has been no meeting of the minds in reality and no contract: *Gardner v. Lane*, 9 Allen, 492, 85 Am. Dec. 779.

It is contended that there was no mutual mistake in this matter. That if there was a mistake it was the mistake of the plaintiff alone. But the contract itself speaks upon that point, and speaks for both parties. It assumes that the fact existed and bases the contract on that assumption. Neither party could show by evidence aliunde that he knew that Kelly & Lysle were not making and could not make in their mill as then "constructed and operated" fifty-five per cent patent flour without bringing his good faith into question.

There is some discussion in the briefs over the term "can make" in reference to the quality of flour to be produced by

the Kelly & Lysle mills, the plaintiff's guaranty as to efficiency ⁶⁵⁶ being that the mill to be furnished will produce sixty-five per cent flour "equal to the best fifty-five per cent that Kelly & Lysle can make in their mill as now constructed and operated." It is contended that those words do not indicate that Kelly & Lysle were making fifty-five per cent flour, but only an assurance that the mill to be furnished would do better than the rival mill could do. The contract might have been so worded as to have made a possible test of the two mills as a collateral fact carrying a forfeiture or reward, leaving the contract in its main features capable of being performed and of being enforced both as to the mill to be furnished and the payment to be made, irrespective of the test, and in that event the failure to obtain the means of making the comparative test would affect only the collateral feature. But in this case the plaintiff, after completing the mill, could not recover the contract price until it had proved the capacity of its mill by that test, so this condition goes to the vitals of the contract itself. It is said in the evidence that the contract was written by defendant and its wording is his choosing. Not much importance should be given to that fact in an issue of this kind (though in the trial of some issues that would be a material consideration), because when the contract is made it becomes the act of both parties. But the circumstances under which it was made and the object in view should be considered in giving meaning to doubtful terms. The Kelly & Lysle mills were at the time in operation at Leavenworth, Kansas, and the defendant's mill was to be located in Wyandotte county, in that state. The object of the clause in the contract now under discussion was to obligate the plaintiff to build a better mill for defendant than that of Kelly & Lysle—one that would produce a patent flour of higher percentage of equal quality, and the clause binds the plaintiff to accomplish that end as a condition precedent to its right to payment. Can it be supposed that the plaintiff in its right senses, or the defendant in good faith, was indifferent to the fact as to the per cent of flour ⁶⁵⁷ the rival mills were actually producing and rested their test upon a mere chance? Good sense and good faith both repel that suggestion.

Appellant contends that when it became known that Kelly & Lysle had never made, and refused to make, fifty-five per cent patent flour, so that the test contemplated could not be attained, it was the duty of plaintiff to have proceeded with

its part of the contract and to have trusted to a recovery quantum meruit for its compensation. Plaintiff was under no such obligation. It had not contracted to build for defendant "as complete and perfect a flouring-mill, as far as construction, durability, and easy working is concerned, as any in the United States," of the capacity of fifteen hundred barrels a day, and receive in payment therefor what a jury might say the time, labor, and materials were reasonably worth, but had agreed to do so for a certain price. It was bound by its contract, or not bound at all, and was entitled upon a fulfillment of the same on its part to the contract price. True, if it had completed the work and defendant had accepted it, plaintiff, in a count on quantum meruit, could have recovered its value within the contract price. But this is a suit on a contract, and the rights of the parties are to be determined by the contract alone.

This contract was so guardedly framed that the plaintiff could not by its terms receive as pay anything at all until it had proven by the test specified that the mill had the promised capacity. Defendant agreed to advance certain sums at stated events, but not to make payments.

There is another feature of this contract that is not to be overlooked in this connection: The sixty-five thousand dollars to be paid for the mill when brought up to the first test specified was not the only consideration which induced the plaintiff to enter into the contract, but if a certain higher degree of excellence and efficiency were attained, measured also by the fifty-five per ⁶⁵⁸ cent output of the Kelly & Lysle mill, the contract price was to be seventy-five thousand dollars or eighty-five thousand dollars. Now, suppose when Kelly & Lysle refused to alter their mill to make the percentage flour required for the test, and when defendant refused to modify the contract as to that test, plaintiff had proceeded and built a mill in all respects as called for in the specifications, how could it by any form of suit have recovered the price of this higher excellence which the contract promised? No count on quantum meruit would avail. When labor and materials are furnished by request and no price is agreed on, the law will imply an agreement to pay what it is reasonably worth. But men are not restricted to that valuation in making their contracts, and particularly in the arts and sciences men often contract for a higher price in view of the skill and learning expected than the ordinary market value of such commodities. When men

contract for such prices, the law does not require them to be content with a jury's valuation. We are not now dealing with an implied contract. These parties intended to make a contract very specific in all its terms both as to the mill to be manufactured and the price therefor to be paid. The specifications were elaborate, covering every point of construction, but the defendant was not satisfied to have the mill to be judged, when finished, by an examination of itself, but required it to be tested by its product, and required the plaintiff to prove by that test that it was a better mill than that of Kelly & Lysle. Until so proven the plaintiff's work was not up to the required standard and defendant was bound to pay nothing, and all this testing would have been perfectly feasible if the fact had been as they supposed it to be, that Kelly & Lysle made fifty-five per cent patent flour, but as that was not the fact, the contract which the parties attempted to make, believing that it was a fact, became impossible of performance in a very material part and wholly failed of its purpose. This is the view of the case taken by the circuit court and its judgment is affirmed.

All concur, except Robinson, J., absent.

CONTRACT MADE UNDER MISTAKE OF FACT.—If certain facts are assumed by both parties as the basis of a contract, and it subsequently appears that such facts did not exist, the contract is inoperative: *Fink v. Smith*, 170 Pa. St. 124, 50 Am. St. Rep. 750.

CONTRACT—IMPOSSIBILITY OF PERFORMANCE.—If one contracts to do a thing which is possible in itself, he is liable for a breach thereof, notwithstanding it is beyond his power to perform it. An exception to this rule exists when the contract is made on the assumed continued existence of a particular person or thing, and such person or thing ceases to exist: *Anderson v. May*, 50 Minn. 280, 36 Am. St. Rep. 642. See, too, *Leavitt v. Dover*, 67 N. H. 94, 68 Am. St. Rep. 640.

RECOVERY ON THE QUANTUM MERUIT on entire contracts is treated in the monographic note to *Huyett etc. Co. v. Chicago Edison Co.*, 59 Am. St. Rep. 283-285.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

TRENTON POTTERIES COMPANY v. OLIPHANT.

[58 New Jersey Equity, 507.]

CONTRACTS—OPTIONS—JOINT OR SEVERAL.—An option for a certain period to purchase a business and its goodwill, containing an agreement not to engage in a competitive business within certain limits of space and time and signed with the firm name, and having a renewal of the option to purchase attached thereto and made part thereof, and signed by all of the members of the firm giving the original option, constitutes a joint and several undertaking not to engage in a competitive business binding on such firm and each of its members.

CONTRACTS—RESTRAINT OF TRADE.—A contract that the vendor of a business and its goodwill will not engage in a competitive business, though in restraint of trade, is not invalid, when such restraint is not general but partial, and no more extensive than is reasonably required to protect the purchaser in the use and enjoyment of the business purchased, and not otherwise injurious to the public interest.

CONTRACTS—RESTRAINT OF TRADE.—The test of the validity of contracts in restraint of trade is to be found alone in their being reasonably essential to the protection of the purchaser, and there are at the present day trades in which a general restraint cannot be held to be unreasonable.

CONTRACTS IN RESTRAINT OF TRADE—AREA COVERED.—A contract that the vendor of a business and its goodwill will not engage in the same business "within any state of the United States," except certain named states, "for the period of fifty years," includes any and all states not specifically excepted, and is enforceable in those of them only in which the business purchased has been carried on, and within which the restraint contracted for is reasonably required by the vendee for his protection in the use and enjoyment of such business. Such contract does not cover states in which the business purchased has never been carried on and to which it might be extended. In such states the contract is not enforceable.

CONTRACTS IN RESTRAINT OF TRADE—PERIOD OF TIME.—A contract that the vendor of a business and its goodwill

shall not engage in the same business for the period of fifty years, which is the period of the corporate existence of the purchaser, is not unreasonable as to the limitation of time.

CONTRACTS IN RESTRAINT OF TRADE—TRUSTS.—Contracts by independent and unconnected manufacturers of or traders in a public commodity looking to the control of the price thereof, either by limitation of production or by restriction on distribution, or by express agreement to maintain specified prices, are opposed to public policy and void as creating a trust or monopoly.

CONTRACTS IN RESTRAINT OF TRADE—MONOPOLY.—A contract of purchase by one person of five distinct manufactories of a public commodity, containing a stipulation by each of the five vendors not to engage in a competitive business for a long period of time and over a great extent of country, is not void as creating a monopoly, or as being in restraint of trade, provided such stipulation is reasonably necessary to protect the purchaser in the enjoyment of the business.

CONTRACTS IN RESTRAINT OF TRADE—MONOPOLY BY PURCHASE.—A person engaged in any lawful manufacture or trade may lawfully buy the business of any and all of his competitors, although the effect of such purchase is to diminish or even to exclude competition.

CORPORATIONS MAY LAWFULLY DO ANY ACTS within the corporate powers conferred upon them by legislative grant.

CORPORATIONS—POWER OF PURCHASE.—A corporation may lawfully purchase the plant and business of competing individuals and corporations, if authorized so to do by the statute under which they are created, although such purchase may diminish, or, for a time at least destroy competition, and create a monopoly.

CONTRACTS IN RESTRAINT OF TRADE—PURCHASE BY CORPORATION.—A contract by a corporation, having legislative authority, for the purchase of competing plants and business, as well as a contract incidental thereto and reasonably necessary to make such purchase effective by protecting the purchaser in the use and enjoyment of the business purchased, may be made and is enforceable, although as a result thereof competition is diminished or temporarily destroyed, and such contracts cannot be declared by the courts to be repugnant to public policy and void, although they tend to produce, and may temporarily produce, a monopoly of the business thus purchased.

W. M. Lanning, G. D. W. Vroom, and L. C. Ledyard, for the appellant.

S. D. Oliphant, Jr., R. V. Lindabury, and J. H. Choate, for the respondent.

⁵¹⁰ **MAGIE, C. J.** The appeal in this cause is from a decree of the court of chancery, made upon the advice of Vice-Chancellor Grey, dismissing appellant's bill of complaint and denying the relief sought thereby.

The pleadings in the cause, the issues presented, and the facts established by the proofs are set out with such completeness in the opinion of the learned vice-chancellor and the statement preceding it that it is unnecessary to repeat them here.

The bill was filed by appellant against the seven defendants and respondents to restrain the breach of contracts alleged to have been made by them with it. It was dismissed as to all the respondents upon the ground that the contracts in question were in illegal restraint of trade and against the public policy of the state. As to three of respondents, the dismissal was also put on other grounds. As to James V. Oliphant, one of respondents, one additional ground was that he had not become bound to appellant by any such contract. As to him and also as to Richard C. and Henry D. Oliphant, also respondents, the additional ground for dismissal was that the proofs disclosed no breach of the contracts on their part.

The appeal is from the whole decree, but counsel for appellant conceded in the argument that although Richard C. and Henry D. Oliphant were proved to have been bound to appellant by the contracts which the bill sought to enforce, yet that no sufficient evidence of any breach of those contracts by them appeared. It results that so much of the decree as dismisses the bill as to them must be affirmed.

But appellant contends that the dismissal of the bill as to James V. Oliphant cannot be supported upon the additional grounds assigned therefor. This contention requires a review of the proofs touching the relation of James V. Oliphant to the contracts in question, which were contracts to abstain from the manufacture of pottery ware. The first contract claimed was contained in a letter addressed to one Tapscott, dated January 23, 1891, and signed "Oliphant & Co.," which is set out in the prefatory statement of the vice-chancellor. The other contract relied on was contained in a sealed instrument, dated July 6, 1892, purporting to be made between the seven respondents and Tapscott, also to be found in that statement. This writing was executed by all the respondents except James V. Oliphant.

The proofs show that, at the date of the letter in question, James V. Oliphant was not a member of the firm of Oliphant & Co. He became a member about January 1, 1892. The letter gave Tapscott an option to purchase at a stated price the pottery business carried on by Oliphant & Co., including the real estate, plant and goodwill, which option was to be exercised within a limited period. That period had expired when James V. Oliphant became a member of the firm. On February 1, 1892, all the members of the firm, including James V. Oliphant, signed a writing addressed to Tapscott, extending the option originally given for a period of ninety days.

The option was accepted by him on May 20, 1892. On May 21, 1892, an agreement of sale was signed by all the members of the firm except James V. Oliphant. But on May 23, 1892, he executed under seal a memorandum of agreement to the terms and conditions mentioned in the agreement of the other owners of the property which was the subject of the sale. The sale was consummated on June 6, 1892. Tapscott was acting in the transaction for those who formed the corporation which is the appellant, and for that corporation after its formation on May 27, 1892. Appellant acquired all Tapscott's rights in the contracts with respondents.

The vice-chancellor reached the conclusion that the bill should be dismissed as to James V. Oliphant, because not having executed the sealed instrument of July 6, 1892, he had not become bound by its covenants, and because the contract of the letter of January 23, 1891, adopted and ratified by him by his joining in the extension of the option by the writing of February 1, 1892, was a joint and not a several contract, and merely bound the firm of Oliphant & Co. not to engage in a competitive business.

⁵¹² The omission of James V. Oliphant to execute the instrument of July 6, 1892, unquestionably deprives appellant of any right to enforce its provisions against him in this cause.

If necessary to construe the contract contained in the letter of January 23, 1891, I think it would be difficult, if not impossible, to hold it to be a mere partnership undertaking. No doubt an obligation entered into by more than one person is presumed to be joint, and a several responsibility will not arise except by words of severance: *Alpaugh v. Wood*, 53 N. J. L. 638. But the purpose of this letter was to give an option to purchase a business carried on by individuals who were partners. It recites that "we, the undersigned," do business under a firm name and own and control the Delaware pottery, which was the subject of the offer to sell. It contains an agreement that, in case of sale, "we will not, directly or indirectly," engage in a competitive business. In my judgment, it would not be an unnatural or strained construction to attribute to these words a several force, and to find that the firm signature thereto bound the members of the firm not merely jointly but also severally. Upon any other construction it is obvious that the protection of the business and goodwill proposed to be sold would only be partially secured.

But we are not required to construe the terms of the letter by themselves. By the extension of the option by the writing executed by all the firm members, including James V. Oliphant, on February 1, 1892, a several quality in the contract contained in that letter either was recognized as originally in it or was imparted to it. By that instrument each partner agreed to an option of purchase for a fixed period, and that such agreement should be part of the original option given by that letter. When they all executed that instrument and declared that it was to be attached to and become part of the original option, the then owners made a new contract, in the terms of the former contract, which bound those signing as if they had signed the original option with the extended term. The contracts thus amalgamated stipulated that in the event of sale "we will not directly or indirectly" engage in a competitive business. These words, over individual signatures respecting a business previously averred to be a partnership business, indicate several as well as joint undertakings. It is as if they undertook that they would not directly, by their joint act as a firm, or indirectly, by any several act of any member, engage in a competitive business. This construction is greatly aided by the exception from the undertaking, whereby the proposing vendors are permitted to engage in the business of manufacturing pottery ware as agent or employé of the proposing purchaser. These words indicate a relation which might be formed between vendors and purchaser in case of sale effected. While the firm could become the purchaser's agent, it could not in any other sense become his employé. Individual members of the firm might become either agents or employés. The exception therefore indicates that the contract it limited was one affecting individual members of the firm.

As James V. Oliphant, upon this construction, became bound by this contract, and as the proofs show that he has broken it, the decree dismissing the bill as to him cannot be supported on this ground.

It is next to be considered whether the decree can rest upon the ground that the contracts sought to be enforced are in illegal restraint of trade.

The contract contained in the letter of January 23, 1891, and the covenant of June 6, 1892, are the obligations which the bill was filed to enforce. They are identical in terms and purport to bind respondents to absolutely refrain from engaging in the business of manufacturing pottery ware "within any

state in the United States of America or within the District of Columbia, except in the state of Nevada and the territory of Arizona, for the period of fifty years." They are contracts in restraint of trade.

This court, speaking by Chief Justice Beasley, more than thirty years ago, declared that contracts in general restraint of trade are illegal: *Brewer v. Marshall*, 19 N. J. Eq. 537, 97 Am. Dec. 679. The learned chief justice found that to have been the undisputed rule of the English and of our own courts since the decision ⁵¹⁴ in 1711 of *Mitchell v. Reynolds*, 1 P. Wms. 181. In that celebrated case Lord Macclesfield placed the illegality of such contracts upon the sole ground of their being inimical to the public interest or public policy. To the same origin the rule denying validity to such contracts was attributed by the chief justice in our leading case above cited. Our court of chancery has announced and applied the rule, and upon the same ground: *Mandeville v. Harman*, 42 N. J. Eq. 185; *Sternberg v. O'Brien*, 48 N. J. Eq. 370; *Althen v. Vreeland* (N. J. Eq., Jan. 13, 1897), 36 Atl. Rep. 479.

In determining what is the public policy in this regard we have, however, to take into account certain contracts which restrain trade. It is of public interest that everyone may freely acquire and sell and transfer property and property rights. A tradesman for example, who has engaged in a manufacturing business and has purchased land, installed a plant and acquired a trade connection and goodwill thereby, may sell his property and business with its goodwill. It is of public interest that he shall be able to make such a sale at a fair price and that his purchaser shall be able to obtain by his purchase that which he desired to buy. Obviously, the only practical mode of accomplishing that purpose is by the vendor's contracting for some restraint upon his acts, preventing him from engaging in the same business in competition with that which he has sold. His contract to abstain from engaging in such competitive business is a contract in restraint of trade, but one which, from the time of *Mitchell v. Reynolds*, 1 P. Wms. 181, to this time, has been recognized as not inimical to, but permitted by, public policy. Therefore, while the public interest may be that trade in general shall not be restrained, yet it also permits and favors a restraint of trade in certain cases.

Contracts of this sort which have been sustained and enforced by courts have been generally declared to be such as restrain trade, not generally, but only partially, and no more exten-

sively than is reasonably required to protect the purchaser in the use and enjoyment of the business purchased, and are not otherwise injurious to the public interest. This is the doctrine declared and applied in the court of chancery and recognized in this ⁵¹⁵ court by our affirmance of its decrees: *Richardson v. Peacock*, 26 N. J. Eq. 40; 28 N. J. Eq. 151; 33 N. J. Eq. 597; *Mandeville v. Harman*, 42 N. J. Eq. 185; *Finger v. Hahn*, 42 N. J. Eq. 606; *Hahn v. Finger*, 44 N. J. Eq. 604; *Sternberg v. O'Brien*, 48 N. J. Eq. 370.

It is observable that of late and elsewhere it has been questioned whether the rule as thus stated is not too broad to be applicable to present conditions. In 1711 trade was subject to limitations which have largely diminished or ceased to exist. Where orders and responses had to be transmitted by mail or messenger, and the mail and travelers were carried by coaches drawn by horses, and goods were transported by pack or wagon, the area of the trade of a manufacturer or tradesman was necessarily limited by those conditions. Now that orders and responses may be transmitted for long distances by telephone and over the world by telegraph, and goods and travelers may have quick transit over land and sea, the area of such trade may be immensely greater. Thereupon, it is contended with great force that the true test of the validity of such contracts in restraint of trade is to be found alone in their being reasonably essential to the protection of the purchaser, and that, considering the vast extent of the area of some trades, there are cases in which a general restraint cannot be held to be unreasonable: *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464; *Nordenfelt v. Maxim etc. Co.*, [1894] App. Cas. 535; *Rousillon v. Rousillon*, 14 Ch. Div. 351; *Leather etc. Co. v. Lonsont*, L. R. 9 Eq. 345; *Morse Trust Drill Co. v. Morse*, 103 Mass. 73, 4 Am. Rep. 513; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396; *Underwood v. Barker* (1899), L. R. 1 Ch. 300.

The question thus suggested does not arise in this case unless the contracts before us are found to be contracts in general restraint of trade. This leads us to inquire whether they are general or only partial in their restraint, and, if the latter, whether they extend beyond what is reasonable for a fair protection of the business and goodwill which appellant purchased from respondents.

The contention on the part of respondents is that the contracts in question restrain them from engaging in the business of ⁵¹⁶ manufacturing pottery ware in an area comprising the whole

United States, and that the exception of one state and one territory was illusory and colorable because they claim the proofs show that such manufacture cannot be carried on in those localities with profit. It is insisted that a restraint extending over the whole nation is a general and not a partial restraint.

It was well said by Judge Andrews, in his opinion in *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464, that "the boundaries of the states are not those of trade or commerce." It may also be said that in these days the business of many concerns extends not only beyond the boundaries of the state in which it has a local habitation, but even beyond the limits of the nation. Yet the public policy of that state may be involved in favor of or against the restraint of such trade, however widely extended. It is possible to conceive of a business so widely extended that a restraint of it within the limit of one country might be in fact but a partial restraint.

In the case last cited an exception of one state or territory similar to that contained in the contracts in question was pronounced not colorable, but the case does not indicate that the exception was shown by the proofs to be of territory in which the restrained manufacture could not be carried on with practical results. In this case the proofs establish that to be the fact as to the area included in the exception. It is contended for appellant, however, that the fact so established is immaterial, because the rule against general restraint of trade is an arbitrary one, and an exception from the restraint, however unsubstantial or illusory, will make the restraint partial. It is not easy to perceive how a rule of this character, founded on considerations of public policy and applied in the public interest, can be rightly deemed arbitrary in the sense intended in this contention. Nor is it obvious that the courts would permit the evasion of the rule by illusive contrivances.

But the question presented need not be decided unless the contracts, properly construed, extend the restraint of respondents over the whole area of the United States except the excepted parts. If, by the true construction, the contracts are divisible ⁵¹⁷ and bind respondents to a restraint in one or another of separately described areas, and, as applied to one or more of such areas, the restraint is not unreasonable, the suggested question need not be solved.

The area or areas within which the restraint upon respondents is engaged for in these contracts is described as being, not (as stated in the opinion below) within any state of the United

States of America, but "within any state in the United States of America."

In seeking the meaning of this description we are to be guided by the ordinary rules of construction. We may presume that the contracting parties intended to make a valid contract, and, in this case, under the doctrine enunciated in *Brewer v. Marshall*, 19 N. J. Eq. 537, 97 Am. Dec. 679, that they designed to contract for a restraint which would be partial and not general, and reasonable, in their judgment, for the protection of the purchaser in the enjoyment of the subject of the purchase. The contracts are to be construed so as to give them validity, if such construction does no violence to their language, and the subject matter of the contracts is to be considered and their terms are to be construed in reference thereto. Here the transaction was the sale and purchase of an established business, with its goodwill, and the contracts in question were plainly intended to furnish protection to the purchaser in the enjoyment of the things purchased. Respondents received a large sum of money for what they sold appellant, which they yet retain, and it is clear that the consideration thus received and retained must have been enhanced in amount by the obligation of the contracts now in question, and that so much could not have been obtained by the respondents if no obligation to restrict competition had been made.

Examining thus the description of the area within which the restraint agreed to by respondents is to operate, I have reached the conclusion that, without doing any violence to the language or straining its import, it may be, and ought to be, held to be a divisible description, embracing not one whole area but several areas disjunctively described. The exception of the territory of Arizona is urged as inconsistent with this construction. But ⁵¹⁸ the express inclusion of the District of Columbia equally militates against the contrary construction, for if the description covers the whole area of the United States of America, the District of Columbia was already included. Looking at the subject of the contracts, their presumed intent and the purpose of any agreement to restrain respondents from engaging in a competitive business, the description can be read as applicable disjunctively to different areas, as within the state of Maine, within the state of New Hampshire, or within the state of New Jersey, etc., or within the District of Columbia, excepting, etc., and such should be its construction.

Thus read, the contracts in question are applicable to all the described areas and are enforceable in those of them within which the restraint contracted for is reasonably required for the protection of appellant in the use and enjoyment of the business and goodwill acquired from respondents.

An instructive case on this point has lately been decided in England. The question arose upon a covenant by an employé with his employer that within twelve months after leaving his employment he would not engage in a similar business "in the United Kingdom, or in France, or in the Kingdom of Belgium, or Holland, or in the Dominion of Canada." The employé voluntarily left the service of his employer and entered into the employment of a merchant in the same trade in England. Upon a bill by the first employer, Mr. Justice Kekewich allowed an injunction against the breach of the covenant. Upon appeal the cause was heard in the chancery division before Lindley, master of the rolls, and Lord Justices Rigby and Vaughan Williams. The master of the rolls and Lord Justice Rigby held that the covenant was a separable one and was not unreasonable as to the restraint imposed on the covenantor within the United Kingdom, and they sustained the injunction. Vaughan Williams dissented, but upon the ground that the restraint within the whole of the United Kingdom was unreasonable: *Underwood v. Barker* (1899), L. R. 1 Ch. 300.

It is next to be considered whether the contracts in question, thus construed, were reasonably required for the protection of ⁵¹⁹ appellant, and to what extent, if any, they should be enforced under the proofs in the cause.

It appears by the proofs that the business which appellant purchased of respondents had been carried on by them within an area, roughly speaking, covering the states east of the Mississippi river and north of a line drawn through Richmond and Louisville, including the District of Columbia.

Appellant contends that such contracts were reasonably required to protect it, not only in the areas in which the business it purchased of respondents had been carried on, but also in other states to which it might extend that business. But this contention I deem to be inadmissible. The validity, in this respect, of such contracts is to be tested by the effect upon the business and goodwill sold and purchased. What is reasonably required to protect that may be upheld. But the vendor can no more contract to restrict his use of his trade or calling beyond

such protection than he could do if he had made no sale at all. Such a contract would be opposed to public policy.

But while it results from this view that the contracts in question, so far as they restrain respondents from engaging in the same business in localities in which the business purchased by appellant or them had never been carried on may be opposed to public policy, it does not follow that they are wholly unenforceable. Contracts including distinct and separable obligations, some of which are legal and some prohibited, are enforceable as to such obligations as are legal: *Erie Ry. Co. v. Union Locomotive etc. Co.*, 35 N. J. L. 240; *Stewart v. Lehigh Valley R. R. Co.*, 38 N. J. L. 505. These contracts, as to areas described therein in which the acquired business had been carried on, may be enforced upon proper proofs.

Upon the proofs, how far may these contracts be enforced? The prayer of the bill is for an injunction in the terms of the contracts. But this would be too broad a restraint on respondents, because it would include localities in which the purchased business had never been carried on and where no protection of it was required. Upon the proofs I conclude that no restriction can be imposed upon respondents as to any area beyond the ⁵²⁰ state of New Jersey. In this state all the respondents except Richard C. and Henry D. Oliphant are actively engaged in the very business they contracted not to engage in. There is some proof of sales and solicitation of trade in other prohibited areas, but it lacks the requisite certainty to justify a broader injunction.

It remains to consider other objections to the reasonableness of these contracts. It is contended that they are unreasonable because they restrain respondents from the manufacture of any pottery ware, while the business sold is claimed to have been that of manufacturing sanitary pottery ware. But the plant respondents sold was adapted to the manufacture of other kinds of ware, and they had in fact manufactured other ware. The business purchased was not the mere manufacture of sanitary pottery ware, and the contracts were not too broad in furnishing appellant protection in respect to the manufacture of all pottery ware.

It is further objected that the contracts in question extend the restraint upon respondents over too great a period of time. The ages of respondents, it is said, show that, at the expiration of the limit of fifty years, probably some of them will have died and all of those surviving will have passed the age of business

activity. The contracts are not unlimited in time, but the insistence is that they are unreasonable because of the long period of restraint. But whether they are reasonable is not to be determined by their disadvantageous effect upon respondents, but by considering whether the restraint to which, for what they received as a sufficient consideration, they bound themselves was reasonably required to protect the purchaser in the enjoyment of his purchase. As they were dealing with a corporation which had acquired a corporate life of fifty years for the purpose of carrying on this business, the limit of time fixed by the contracts is not unreasonable. The fact that the limit exceeds the corporate life of appellant by a few days does not, in my judgment, require a different conclusion.

It remains to consider whether the contracts in question are otherwise against the public policy of our state. The learned ⁶²¹ vice-chancellor held them to be opposed to the public interest, because he conceived that they tended to create a monopoly in the business of manufacturing sanitary pottery ware. This effect he deemed established by the proofs that appellant, simultaneously with its purchase from respondents, also purchased four other plants used in the manufacture of such ware in Trenton, and the property, business, and goodwill of their owners, and took from each of those vendors contracts restraining them from engaging in the business of manufacturing pottery ware, substantially identical with the contracts taken by it from respondents. The contracts procured from respondents he deemed to be part of a scheme to control the production, distribution and sale of sanitary pottery ware and to exclude competition therein. Such ware he declared, on the authority of the promoters of appellant, to be a necessity of life.

The scheme held to be reprehensible was found in the situation disclosed in the proofs. Respondents, as owners of the business sold to appellant, had, several years before the sale, united with the owners of seven other potteries in Trenton, which made, among other things, sanitary pottery ware, in an association called the "American Sanitary Potters' Association." That association had in some way controlled the prices at which such ware produced by its eight members (counting the owners of each pottery as one member) should be put upon the market. The action of the association in that regard was determined by a majority of its eight members. By its purchases appellant acquired the interest of five of the members, and seems to have been permitted to cast a vote for each in controlling the action

of the association. After appellant's purchases prices were so controlled for some time and until the association fell to pieces.

Contracts by independent and unconnected manufacturers or traders looking to the control of the prices of their commodities, either by limitation of production or by restriction on distribution, or by express argument to maintain specified prices, are without doubt opposed to public policy. The contract of the sanitary potters' association in this regard was inimical to public interest when respondents were members of it, and none the less ⁵²² so when appellant acquired the property of five of its members. However solemnly the members of that association may have obligated themselves to obey the behests of the majority in respect of the control of prices of their ware, no court would have enforced their agreements or awarded damages for any breach of them.

But the contracts by which appellant acquired the property and business of respondents and of four other members of the association contained no term stipulating for the continuance of the association or for the enforcement of any objectionable agreements it had entered into. At the most, so far as appears, the contemporaneous purchases by appellant gave it an opportunity to use the majority vote in the association for such control of prices as its agreements provided for. Although the control of the voting majority of the association may have been one of appellant's motives for making its simultaneous purchases, it is inconceivable that any one of the five vendors could have repudiated his contract to sell to appellant on the ground that such sale, if consummated, would enable appellant to obtain such control. The public interest would be amply protected by invalidating the agreement of the association for the control of prices and the disconnected agreement of sale would be enforced as other contracts.

It is further urged that the simultaneous contracts procured by appellant create, or tend to create, a monopoly, because they stipulate for the removal of many competitors in the business of manufacturing sanitary pottery ware. The owners of five of the eight potteries in Trenton manufacturing that kind of ware (and there were but few, if more than one, elsewhere) thereby agreed not to engage in that business for a long period of time and over a great extent of country. The engagement of respondents in that respect has been found not to be an improper restraint of trade nor inimical to public policy on that ground, but a contract partially enforceable upon respondents,

if not otherwise objectionable. The engagements of the other vendors who sold their properties and business to appellant are similar in terms to that entered into by respondents, and furnish a reasonable protection ⁵²³ to appellant of the business and goodwill purchased by it of each of them. Each sale and each incidental contract against competition are, for reasons before given, unobjectionable. Are they rendered objectionable by the fact that, being simultaneously made, they excluded from engaging in the business of manufacturing sanitary pottery ware so large a proportion of those previously engaged in that manufacture?

It is to be observed that the contracts of respondents and the other vendors to appellant restricted them from engaging in the business of manufacturing, not sanitary pottery ware alone, but all pottery ware. The proofs show that a large number of persons are engaged in manufacturing pottery ware in various parts of the country, and that the contracts in question would exclude from competition a very small proportion of them. But as the proofs also show that the main purpose of appellant was to engage in the manufacture of sanitary pottery ware, I have stated the proposition in a more restricted form.

Whether sanitary pottery ware has become a necessity of life is open to question. It is certain that many persons manage to exist without using it. But if its use is of importance to health and comfort, and a considerable and increasing number of persons desire to acquire and use it, the public may have such an interest in its manufacture and sale that public policy will justify judicial interference and refusal to enforce illegal combinations to enhance its price. The elimination of competition may produce that result. The contracts in question were not intended to withdraw, and do not appear to have withdrawn, from work a single workman in that industry. They restrain a comparatively small number of capitalists who had previously employed their capital in such manufacture from continuing so to do. The entire capital of the country, except theirs, is free to be employed in the manufacture. There seems no ground for the claim that we should refuse to enforce respondents' contracts by injunction when the proofs furnish no reason for the belief that the public will suffer if they are held to their bargains.

The contemporaneous contracts were all made as incidental to the sale and purchase of competing concerns engaged in the ⁵²⁴ manufacture of sanitary pottery ware. They were, as we have seen, reasonably appropriate to the protection of the pur-

chaser in each case. While contracts to restrain or limit competition in the production of that ware may be repugnant to the public interest, such a restraint or limit may result from contracts which the courts are bound to enforce. A person engaged in any manufacture or trade, having the right to acquire and possess property and to do with it what he chooses, may lawfully buy the business of any of his competitors. His first purchase would at once diminish competition. If he continued to purchase, each succeeding transaction would remove another competitor. If his capital was large enough to enable him to buy the business of all competitors, the last purchase would completely exclude competition, at least for a time. But in the absence of legislative restrictions (if such could be imposed) upon the acquisition of such property and its use when so acquired courts could impose no limitation. They would be obliged to enforce such contracts, notwithstanding the effect was to diminish or even to exclude competition.

But appellant is a corporation, and not an individual. Corporations, however, may lawfully do any acts within the corporate powers conferred on them by legislative grant. Under our liberal corporation laws, corporate authority may be acquired by aggregations of individuals, organized as prescribed to engage in and carry on almost every conceivable manufacture or trade. Such corporations are empowered to purchase, hold and use property appropriate to their business. They may also purchase and hold the stock of other corporations. Under such powers it is obvious that a corporation may purchase the plant and business of competing individuals and concerns. The legislature might have withheld such powers or imposed limitations upon their use. In the absence of prohibition or limitation on their powers in this respect, it is impossible for the courts to pronounce acts done under legislative grant to be inimical to public policy. The grant of the legislature authorizing and permitting such acts must fix for the courts the character and limit of public policy in that regard. It follows that a corporation empowered ⁵²⁵ to carry on a particular business may lawfully purchase the plant and business of competitors, although such purchases may diminish or, for a time at least, destroy competition. Contracts for such purchases cannot be refused enforcement.

Since contracts by individuals and by corporations having legislative authority, for the purchase of competing plants and business, may be made and are enforceable, although as a result

thereof competition is diminished or temporarily destroyed, it further follows that contracts reasonably required to make such purchases effective by protecting the purchaser in the use and enjoyment of the thing purchased, cannot be declared by the courts to be repugnant to public policy. The interference with competition resulting from such purchases under legislative permission being found not to invalidate contracts for such purchases, the like interference by contracts reasonably required for the protection of the purchaser cannot be held to invalidate them.

The result is that the decree appealed from must be affirmed as to Richard C. and Henry D. Oliphant, but as to the other respondents it must be reversed and a decree be made enjoining them according to the prayer of the bill within the state of New Jersey.

CONTRACTS IN GENERAL RESTRAINT OF TRADE are void, but contracts in partial restraint of trade are valid and enforceable, if reasonable and supported by good consideration: *Lanzit v. Sefton Mfg. Co.*, 184 Ill. 326, 75 Am. St. Rep. 171; *Harding v. American Glucose Co.*, 182 Ill. 551, 74 Am. St. Rep. 189.

CONTRACTS IN RESTRAINT OF TRADE are not necessarily void by reason of universality of time or of space. Their validity depends upon the reasonableness of the restrictions under the conditions of each case, and the test of reasonableness is the test of validity: *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 49 Am. St. Rep. 784; *Cowan v. Fairbrother*, 118 N. C. 400, 54 Am. St. Rep. 733. A contract of this kind is reasonable if it offers only a fair protection to the interests of the party in whose favor it is made, without being so large in its operation as to interfere with the interests of the public: *McCurry v. Gibson*, 108 Ala. 451, 54 Am. St. Rep. 177.

TRUSTS.—WHAT COMBINATIONS FORM unlawful trusts is the subject of the monographic note to *Harding v. American Glucose Co.*, 74 Am. St. Rep. 235-273.

WEATHERBY v. SLAPE.

[58 New Jersey Equity, 550.]

JUDICIAL SALES—ADJOURNMENT OF.—If an officer strikes off real estate to the highest bidder at the time and place duly advertised for its sale under execution, and, after the persons there assembled have dispersed and gone, the officer returns to the place of sale because of the purchaser's failure to comply with his bid and the conditions of sale, and, shortly before the expiration of the advertised hour of sale, publicly announces that the sale is adjourned for two weeks, such adjournment is not legal, and the sale held under such notice is void. To render such adjourned sale legal, notice thereof must be given in the presence and hearing of the persons assembled at the time and place first fixed for the sale.

N. Grey and S. H. Richards, for the appellants.

J. W. Acton, for the respondent.

551 DIXON, J. The object of the bill in this case is to foreclose a mortgage of real estate which secures a bond for six thousand three hundred and fifteen dollars. The obligor being dead, his executors were made defendants. After decree an execution was issued to the sheriff of Salem county for the sale of the mortgaged premises, and thereupon he advertised that the sale would take place at the county courthouse on December 24, 1898, between the hours of 2 and 5 o'clock P. M., to wit, at 3 o'clock. On the day named, shortly before 4 o'clock, the sheriff put up the property for sale, and after several other bids the complainant bid six thousand eight hundred dollars (her claim amounting to seven thousand one hundred dollars), and then one of the defendants, the son of the mortgagor, bid six thousand eight hundred and fifty dollars. On that bid the property was struck off to him. According to the conditions of sale, the purchaser should at once have paid or secured ten per cent of the price, but this the purchaser refused to do, saying he had an agreement with the complainant that she should take a new mortgage for the whole of the bid. On this refusal the sheriff might, no doubt, have immediately put up the property for sale again or have adjourned the sale, but he did neither. On the contrary, he proceeded to sell other property under another execution, and that being finished, he went away about other business, and the crowd of persons attending the sale dispersed, among them one of the executors, who had been present to protect the estate of the obligor as far as possible from a claim for deficiency. In the meantime the solicitor of the complainant and the purchaser went to the house of the complainant to confer with her as to the alleged agreement. She denied it, and the interview, lasting about half an hour, ended without any satisfactory arrangement being made. At the close of this interview the complainant's **552** solicitor went to find the sheriff, and on meeting him instructed him to adjourn the sale. Accordingly the sheriff, at five minutes before 5 o'clock, at the courthouse, called around him the casual bystanders and publicly announced that he adjourned the sale for two weeks. This announcement was duly advertised in the newspapers, and on January 7, 1899, the sheriff struck off the property to the complainant for three thousand dollars.

On motion to confirm this sale the executors objected, among other things, that the sheriff had no legal right to make an adjournment when he attempted to do so on December 24th, and that, therefore, the second sale was unlawful, but an order confirming the sale was, notwithstanding this objection, entered. From this the executors appeal.

The power of officers having charge of the sale of land under judicial proceedings to adjourn such sales from time to time is established in this state by statute (Gen. Stats., 2979), which also prescribes when and how an adjournment, after it takes place, shall be published, but the mode in which such adjournments may legally be effected is left to be determined on general considerations.

The length of an adjournment rests largely in the discretion of the officer, and unless it be for more than one week no notice of the adjournment beyond that given by the act of adjourning need be published; and even for longer adjournments subsequent publication in the newspapers of a statement of the parties to the cause and of the time and place of the adjournment, without any description of the property, is all that the statute requires. It thus appears that the directions of the statute on this point are of themselves quite inadequate to secure reasonable notice of the adjourned sale. The reason for this obviously is because the legislature assumed that the act of adjourning would be performed in such a manner as would preserve and prolong the force of the original advertisement of sale, in which the property to be sold is accurately described. This assumption is justified by the general rule governing the subject.

Mr. Freeman, in his work on Executions, thus states the rules prevailing in different jurisdictions: ⁵⁵³ "While the power of officers to adjourn sales is undisputed, the courts have not agreed on the character of the notice which must be given of the time to which the adjournment is made. On the one side, it is insisted that a new notice must be given for the time and in the manner required in the first instance. On the other side, the rule is maintained that the officer may give notice by proclamation, made in the presence and hearing of the persons assembled at the time first fixed for the sale." New Jersey has adopted the latter doctrine: *Allen v. Cole*, 9 N. J. Eq. 286, 59 Am. Dec. 516.

Manifestly, this rule was not complied with in the present case. No proclamation of an adjournment was made in the presence and hearing of the persons assembled at the time fixed

for the sale. When proclamation was made those persons had all departed, and they had done so not because they could not be induced to bid upon the property at any price, but because it was evident to them that the sheriff's purpose to sell had been executed. He had struck off the property to a bidder, and the parties directly interested in the sale—the purchaser, the defendants in the suit, the solicitor of the complainant, and the sheriff—had all left the place, as if everything intended to be done had been accomplished. When, in view of these circumstances, the persons who had been brought together by the original advertisement of sale, had gone away, we think it became clear that the force of that advertisement was utterly spent, and therefore the power of the sheriff to effect a legal adjournment by his proclamation was ended. If the property was to be sold again, a readvertisement *de novo* was necessary: *Givan v. Doe*, 5 Blackf. 260.

The order confirming the second sale should be reversed and the sale set aside.

JUDICIAL SALE—ADJOURNMENT—NOTICE.—If a purchaser fails to comply with the terms of a judicial sale, a resale at a future time without an adjournment is bad. In such a case a readvertisement is necessary. However, there are cases holding that when a sale is adjourned a new notice is not necessary: See the monographic note to *Russell v. Richards*, 28 Am. Dec. 588, 589.

STREITWOLF v. STREITWOLF.

[58 New Jersey Equity, 568.]

MARRIAGE AND DIVORCE—DIVORCE IN ANOTHER STATE—DOMICILE—FRAUD.—A decree of divorce obtained in another state upon false allegations of domicile therein, is fraudulent and void in the state where the parties have their real domicile.

W. P. Voorhees, for the appellant.

A. H. and T. Strong, for the respondent.

The court of errors and appeals unanimously affirmed the decree appealed from, for the reasons given in the court of chancery. The opinion of that court, thus approved, was delivered by Vice-Chancellor Pitney, and is as follows:

564 PITNEY, V. C. I think I need not hear further argument at this time. I have had occasion to examine the question involved, in the recent case of *Felt v. Felt*, 57 N. J. Eq.

101, now before the court of errors and appeals, and have had occasion to think of it.

The object of this supplemental bill is to obtain a decree of the court declaring void a decree of absolute divorce obtained by the defendant against his wife in one of the courts of the state of North Dakota after the filing of the original bill in this cause. The issue raised on this supplemental bill was, by consent of counsel, tried and submitted before the hearing upon the original bill.

The circumstances of the case are these: Mr. and Mrs. Streitwolf were domiciled for many years in New Brunswick, New Jersey. Mr. Streitwolf was in business and owned a house and lot there, which he still owns and rents out. In the early part of August, 1896, his wife left him; the parties separated. On the 17th of August of the same year she filed a bill against him for a divorce from bed and board on the ground of cruelty, and obtained an order for alimony pendente lite against him.

In November of that year he sold out his business in New Brunswick, but rented the building and furniture to the grantee of the business, and went to New York, and boarded there at a particular place for a while and then went to Europe on a pleasure tour, and spent the winter in Egypt and the Mediterranean. He returned to New York in March of the following year and remained there until May 5, 1897.

In the month of April, 1897, negotiations were going on between him and his wife as to a settlement of their difficulties, which produced no results. That the negotiations had entirely failed was manifest a few days before the 1st of May, as I understand Mr. Streitwolf's evidence.

About that time he became acquainted with a firm of lawyers, Hoggatt & Caruthers, who had an office in New York and another in Mandan, North Dakota. They were attorneys who he learned were engaged in the business of procuring divorces, and he talked with them, as I understand his evidence, and ~~was~~ found that they had an office and representative in Mandan, North Dakota. Mr. Streitwolf had never been in Mandan; he knew nobody there, had no connections directly or indirectly with Mandan, or with anybody in North Dakota—he was a perfect stranger to Dakota, both he and all his family.

On the 6th of May, 1897, without informing anybody where he was going, or that he intended to change his residence—that he intended to leave New York or New Jersey, or anything of the kind—he left secretly, you may say, on his own confession,

and went to Mandan; arrived there on Sunday morning, the 9th of May. On the afternoon of the same day he was introduced by a traveling companion to Mr. Voss who represented Hoggatt & Caruthers in Mandan. He took board at a boarding-house and stopped there a few weeks and then went to the Yellowstone Park. He wrote nobody at all that he was at Mandan, dated no letters there, and gave no notice to anybody of his residence there. But while in the Yellowstone Park he wrote to his son that he was taking a trip through that country; and I think there is some evidence from which a jury might infer that he gave it out when he left New York that he was simply going on a pleasure trip.

In July he came back to New York and was there a week or more. He stopped on the way in Minnesota, at a meeting of the society of the Elks, and then came on to New York and sought and obtained an interview with his son, who was then living with his mother in Jersey City and working in New York City, and in that interview stated that he was going to Germany to get a legacy that had been left to him, and invited his son to go with him, and his son promised to give him an answer on a certain evening—the 30th of July, I think. The son went to the rendezvous on that evening, and his father was not there. He hunted around and found he had been out riding, or something of that kind. At any rate, about that time Mr. Streitwolf went to Mandan, and his son or any other persons, as far as appears, had not the slightest idea that he had been away from home with a view to changing his residence or adopting a new home, or going into business in some other place. He arrived in ⁵⁶⁸Mandan in August. On the 9th of August, three months from the day he first arrived there, he commenced a suit against his wife for divorce, and took measures to have the papers served upon her in New Jersey.

Now, here is a state of circumstances that did not appear in *Felt v. Felt*, 57 N. J. Eq. 101. It did not appear affirmatively there that the original domicile of Felt and his wife was in New Jersey or New York. It did not appear in that case but that the original domicile of the husband was Utah, where the divorce was granted. But here the original domicile was in New Jersey, and the burden is on the husband to establish the domicile in North Dakota.

Now, he procured a notice, etc., to be served on his wife, and about the time he supposed they might be served wrote this long letter dated August 11, 1897, to his son, in which he

says: "I suppose you have thought my action and conduct toward you a little strange in some ways of late. Well, my dear boy, the time has come when this explains itself."

As soon as the papers in the Dakota suit were served on the wife she applied to the chancellor for an injunction against her husband proceeding with that Dakota suit, and the chancellor granted an injunction, which is dated September 8th. It was sent to Mandan to be served—put in the hands of the sheriff for service—and on the day it was so put in the sheriff's hands Mr. Streitwolf left Mandan and went east to the Mississippi lakes fishing, and was gone, as I recollect the evidence, until a short time before his suit was set for trial, which was an early day in October, as I recollect the evidence, so that there could be no service of the injunction on him personally. It was brought to the knowledge of his counsel, Mr. Voss, and his counsel in New York and his counsel here; but Mr. Streitwolf swears that he did not know of it until the trial in court. That means that his counsel concealed it from him, if what he has sworn to is true. It cannot be put on any other ground. I should be very much surprised if Mr. Voorhees should state in court that he ~~had~~ had not given notice of it to somebody so that it would reach his client.

Mr. Streitwolf obtained his divorce in North Dakota, and the question is whether he was a bona fide domiciled resident there for three months, or a reasonable time, before that decree was obtained. I do not think that there is any particular charm in three months or any other length of time. In Utah it required a year's residence, and it was admitted in *Felt v. Felt*, 57 N. J. Eq. 101, that Felt was a bona fide domiciled resident of Utah for over a year.

If there was a bona fide domiciled residence in the state of North Dakota—if Streitwolf went there as any man would go, entirely independent of the question of a desire to get a divorce; if his going there and his adoption of a domicile was thorough and actual—the mere fact that he expected to have the benefit of the laws of the state for a divorce against his wife may not destroy the value of that domicile for present purposes.

But the fact that he did not go there for that purpose has an effect upon the human mind in determining whether or not, upon all the facts, his residence was bona fide so as to establish a domicile or not, and that is the very point in the case.

Now, there is no proof that he went into solid, substantial business there. Something was said about his contract with

some man who kept a saloon to be a partner or something of that kind. No details were gone into. The landlord with whom he stayed swore that Streitwolf's business was that of soliciting life insurance. He had no business there. I think that whatever business, or whatever hint of business, there may be, is so thin that it makes against rather than for him.

Immediately after he obtained his divorce he was taken sick. He went to Europe soon after, and then this supplemental bill, to be relieved from the effect of that decree, was filed on the 11th of January, 1898; and the notice of that reached him at a sanitarium in the Austrian Alps, and he came home and attended to his business in New York and New Jersey, and from there again went to North Dakota and stayed there during this last summer.

I think that while that evidence of subsequent conduct was ~~was~~ admitted, it can have very little effect on the case, because it was his policy, when he found that his divorce was attacked, to make the best of it by his subsequent conduct.

But it does not appear yet that he had any motive to go there, or anybody to see there, except to get this divorce, and it is to be observed that it was necessary for him to get a divorce quickly. It was necessary for him to have this decree in order to defend the action brought by his wife against him in this state. When he found that he could not settle with her, he went to North Dakota post-haste and commenced his suit there, just ninety days from the very Sunday that he arrived there.

Now, without going into the authorities, and speaking from my recollection of the law as laid down by the most respectable courts, it seems to me that it would be a reproach to the administration of justice to hold that by such a visit under such circumstances he acquired a bona fide domicile in that state, which, as we all know, is notorious as a resort for people seeking divorces.

Therefore, I hold that the evidence satisfies me that there was no bona fide domicile in North Dakota, and that the obtaining of a divorce on the ground of domicile was a fraud on the court, and entitles the complainant herein to a decree that it shall not constitute a defense to her suit.

I think this result is clearly within the ruling of the court of errors and appeals in *Magowan v. Magowan*, reversing this court, as reported in 57 N. J. Eq. 322, 73 Am. St. Rep. 645. There the defendant appeared to the suit.

It is a serious question whether a service out of the jurisdiction can ever be the ground of a decree of divorce, and the only ground upon which it can safely be put is that of necessity, viz., that the party cannot get his rights without such service. That is the ground upon which I put it in the Felt case. But according to the Magowan case, as decided by the court of errors and appeals, as I understand it, if the complainant in this cause, Mrs. Streitwolf, had appeared to the Dakota suit, it would not have prevented her from setting up here that there had been fraud practiced upon the court in the matter of domicile.

569 I am quite clear that this decree cannot prevail, and that conclusion renders it unnecessary to determine the question of a breach of the injunction.

I think it worth while to add one more observation. Upon looking at the North Dakota decree it appears that the plaintiff in that suit, the defendant here, put his case there on two grounds—one extreme cruelty of his wife practiced upon him, and the other on the ground of her adultery. A faint effort was made by a witness who was examined in New Jersey to prove the adultery, and it was that effort which I presume was the cause of the son's publishing the article in the newspaper which was put in evidence herein; but the proof failed, and the Dakota decree is based on cruelty of the wife practiced upon the husband. Now, it is to be observed that either the adultery or the cruelty, if proven, was a complete defense to the action brought by the wife against the husband in this state, but the cruelty was not a ground here for an absolute divorce.

I will advise a decree declaring the North Dakota divorce void, and will take up the further hearing of the cause at such time as may be fixed.

DIVORCE.—TO EFFECT A CHANGE OF DOMICILE for the purpose of obtaining a divorce, not only must the residence at the place chosen for the new domicile be actual, but to the factum of residence must be added the animus manendi: *Magowan v. Magowan*, 57 N. J. Eq. 822, 78 Am. St. Rep. 645.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

HINTON v. PENN MUTUAL LIFE INSURANCE CO.

[128 North Carolina, 18.]

JURISDICTION, EXTRATERRITORIAL, OF STATES OF THE UNION.—Each state in the Union is a coequal with the others in point of authority and power, and one state, through its courts, cannot extend its coercive power, nor provide for personal service of process, nor affect by judicial determination property outside of its own territory; any such attempt is a usurpation of authority and void.

JURISDICTION — PROCESS — PERSONAL SERVICE ON NONRESIDENT.—Personal service of process upon a nonresident, who puts himself within the jurisdiction of the foreign state is valid. But there can be no valid personal service of process from the tribunals of one state outside of its own territory.

JURISDICTION.—SERVICE OF PROCESS BY PUBLICATION may be had on a nonresident, where his property is within the jurisdiction of the court, or where it is necessary to fix the status of a nonresident as to his relations with a resident within the jurisdiction, as in divorce proceedings.

JURISDICTION—PERSONAL ACTION—SERVICE BY PUBLICATION ON NONRESIDENT.—Where an action is merely in personam, to determine the personal rights and obligations of the defendant, service by publication upon a nonresident is ineffectual for any purpose.

JURISDICTION OVER NONRESIDENT—INTERPLEADER —ESTOPPEL.—Where a nonresident is made a defendant by a proceeding in the nature of an interpleader, and a judgment is rendered against him upon a personal service of process in the state where he resides, such judgment is void, and a recital therein that service had been duly made and that he should be forever barred of any claims in respect to the subject matter of the suit works no estoppel.

Shepherd & Shepherd and Pruden & Pruden, for the appellant.

E. F. Aydlett, for the appellee.

¹⁹ MONTGOMERY, J. This action was brought by the plaintiff to recover of the defendant company the amount mentioned in a policy of insurance issued by the company upon the life of W. M. Mitchell, and payable to his executors, administrators, and assigns, and which policy had been assigned by Mitchell to the plaintiff. The defendant in its ²⁰ answer pleaded an estoppel of record in the nature of a judgment which was rendered in the court of law and chancery of the city of Norfolk, state of Virginia. In that suit the administrator of Mitchell brought an action against defendant company for the recovery of the amount mentioned in the policy, and an affidavit was filed therein by one of the officers of the company in which it was stated that the defendant "claimed no interest in the subject matter of the said suit, but that a third party, John L. Hinton (the plaintiff in the present action), a citizen and resident of North Carolina, had a claim to the amount mentioned in the policy, his claim thereto being that he holds an assignment for value of said policy made to him by the said William M. Mitchell in his lifetime, which alleged assignment has come to the notice of the defendant company"; that the original policy of insurance was in the possession of Hinton, and that he had brought an action against the defendant company in one of the superior courts of North Carolina to recover the amount of the insurance, and that that action was then pending; and that there was no collusion between the company and Hinton, and that the company was ready to pay or dispose of "the subject matter" of this action as the court might direct; and there was a prayer that Hinton might be required "to appear and state the nature of his claim, and maintain or relinquish it." The prayer was granted by the court, and an order made requiring Hinton "to appear on a day named therein, that he might state the nature of his claim, and maintain or relinquish the same." Upon a duly certified copy of the court's order, a return was made as follows: "I, John H. Duncan, do hereby solemnly swear, on the eighteenth day of February, 1897, I delivered a true copy of the written order to John L. Hinton, at his residence in the county of Pasquotank, ²¹ state of North Carolina; and that the John L. Hinton to whom I delivered said copy is not a resident of the state of Virginia, and is the same John L. Hinton who is mentioned in this order. I am not a party to, or other-

wise interested in, the subject matter in controversy. J. H. Duncan."

The record shows, as well as the case on appeal, that Hinton did not appear under the notice issued by the court in Norfolk, and judgment was recovered by the plaintiff, administrator of Mitchell, against the defendant company for the amount mentioned in the policy, and it was also decreed that Hinton should "be forever barred of any claims in respect to the subject matter of this suit against the defendant company."

On the trial of the present action in the superior court of Pasquotank county, several issues were submitted to the jury, but only the sixth and seventh are material to be considered on this appeal. The sixth issue was, "Did B. L. Brothers, administrator of William M. Mitchell, recover judgment against defendant for the amount of said policy in Virginia?" and the seventh issue was, "Is plaintiff estopped by said judgment?" The court instructed the jury that if they believed all the evidence they should answer the sixth and seventh issues "Yes."

The evidence material to be considered in its bearing on the sixth and seventh issues consisted of the record of the Virginia court, the parol testimony of Hinton to the effect that no process was ever served on him in Virginia; that he was never in that state while the suit was pending; that he did not know when the suit was brought, and that the only process of any kind ever served on him was the notice issued by the law and chancery court of Norfolk. A witness for the company, C. E. Johnson, testified that he saw Hinton, the ^{2d} plaintiff, in Norfolk several times while the suit was pending in that city, in the law office of some of the attorneys in the case, talking to them about the case, and trying to get a settlement of it. That witness further said that he would not say Hinton was present at the trial, or in Norfolk when the case was being tried, as he did not know but that Hinton knew of the pending of the action, and all about it.

We are of the opinion that the instruction of his honor was erroneous. All of the evidence showed that the plaintiff, Hinton, did not appear in the action in the court at Norfolk. So there is but one point in the case, and that is as to the effect upon Hinton of the judgment in the court of law and chancery of Norfolk, Virginia, which recited that John L. Hinton, the defendant in that action (the plaintiff in this)

had been duly served with the order making him a party to the suit there. That was the only point argued here, and the contention of the defendant was that the judgment from the Virginia court, because it recited that service of the notice had been duly made on the defendant, Hinton, was an estoppel, complete, against the plaintiff in the present action. The main reliance of the defendant was upon the principle laid down in *Harrison v. Hargrove*, 120 N. C. 96, 58 Am. St. Rep. 781. There is a clear distinction between the law laid down in *Harrison v. Hargrove*, 120 N. C. 96, 58 Am. St. Rep. 781, and that which is involved in this case. In *Harrison v. Hargrove*, 120 N. C. 96, 58 Am. St. Rep. 781, the summons was not found among the papers in the case, and there was no other evidence of the service of the summons or of the appearance of the defendants except that in the decree for a sale of the land. It was declared that personal service of the summons had been made, and this court held that in such a case the recital of the service of process upon the defendants protected an outsider who purchased the land ordered to be sold in the ²³ decree, the purchaser being ignorant that personal service had never been made on the defendants.

In the case before us the record shows that the recital made in the case in the court of law and chancery in Norfolk was an erroneous recital in law, because there appeared in the record the return of the person who was deputed to serve the process upon the defendant, Hinton, in that action, and that return shows upon its face that the attempted service was absolutely void.

The court in Virginia, in making the order for the service of the notice upon the defendant, Hinton, claimed the authority to make personal service upon the defendant in North Carolina, under section 2998 of the code of Virginia. Such an order was invalid and void, and the service made under it was therefore void.

Each state in the Union is a coequal with the others in point of authority and power, and it is elementary learning that one state, through its courts, cannot extend its coercive power nor provide for personal service of process nor affect by judicial determination property outside of its own territory. Any attempt by one state to give to its courts jurisdiction beyond its own limits over persons domiciled, or property situated, in another state, is a usurpation of authority and is void. This

law would not apply, of course, in cases where the courts of one state had made personal service of process upon persons who lived in another state, but who had put themselves within the jurisdiction of that other state. And other methods of giving notice of court proceedings to nonresidents are permitted, as service by publication, where the property of the nonresident is brought under the control of the court by attachment or other equivalent act, the theory of the law being that the owner is always in possession of his ²⁴ property, and that its seizure will inform him of the seizure, and that he will look out for his interest. And also other methods of service of process will be allowed in cases where property is sought to be partitioned between residents and nonresidents; in cases to enforce a contract between such persons concerning property within the jurisdiction; in cases of condemnation of a nonresident's property for public purposes, and also to fix the status of a nonresident as to his relations with a resident within the jurisdiction—as in divorce proceedings. But as was said in *Pennoyer v. Neff*, 95 U. S. 727: "Where the entire object of the action is to determine the personal rights and obligations of the defendants—that is, where the suit is merely in personam—constructive service in this form upon a nonresident is ineffectual for any purpose. Process from the tribunals of one state cannot run into another state and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the state where the tribunal sits cannot create any greater obligation upon the nonresident to appear. Process sent to him out of the state and process published within it are equally unavailing in proceedings to establish his personal liability." To the same effect is the opinion in *Grover etc. Sewing Machine Co. v. Redcliffe*, 137 U. S. 287. The attempt, therefore, which was made to make the service upon the defendant, Hinton, through the process from the court of law and chancery in Norfolk being void, it follows that the judgment, based upon that attempted service which "forever barred any claims of Hinton in respect to the subject matter of this suit against the said defendant, the Penn Mutual Life Insurance Company of Pennsylvania," is also void.

The defendant's counsel here admitted that ordinarily ²⁵ the judgment of another state, when used in this state as a basis of an action or as a defense to one, would be open to proof in respect to jurisdiction of the court which rendered it, but he

argued that the judgment of a court of another state under article 4, section 1, of the constitution of the United States, which declares that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state," and the acts of Congress passed in pursuance thereof, cure the defect in the service of the Virginia process, because the judgment recites that service of the notice was duly made, and because this court had decided to that effect in the case of *Hargrove v. Harrison*, 120 N. C. 96, 58 Am. St. Rep. 781, and that this court is bound to give the same faith and credit to the Virginia judgment as was given to the judgment in *Hargrove v. Harrison*, 120 N. C. 96, 58 Am. St. Rep. 781. But the two cases stand on an entirely different footing. One difference, as we have already pointed out, is that the return upon the process served upon Hinton, the defendant in the case in the court of law and chancery in Virginia, shows that it was served personally, in North Carolina, upon Hinton. That attempted service was void upon its face, and the court in Virginia made an error in law in declaring in its judgment that its notice was duly served.

In the next place the defendants in *Hargrove v. Harrison*, 120 N. C. 96, 58 Am. St. Rep. 781, were residents of North Carolina, and within the jurisdiction of the superior court which rendered the judgment, and the fact that the defendants were subject to the jurisdiction of the court was the foundation of the judgment, no summons appearing in the record. If they had been nonresidents, service by publication not having been made, the lack of jurisdiction could have been shown, by all the authorities. There must be a new trial.

A COURT HAS NO EXTRATERRITORIAL JURISDICTION: *De Meli v. De Meli*, 120 N. Y. 485, 17 Am. St. Rep. 652. The courts of a state have no jurisdiction over a nonresident who has never submitted himself to their jurisdiction: *McCreery v. Davis*, 44 S. C. 195, 51 Am. St. Rep. 794. No state can exercise direct authority over persons or property without its territory: *Louisville etc. R. R. Co. v. Nash*, 118 Ala. 477, 72 Am. St. Rep. 181.

JURISDICTION OVER CITIZENS OF ANOTHER STATE is discussed at length in the monographic notes to *Alley v. Caspari*, 6 Am. St. Rep. 179-190; *De La Montanya v. De La Montanya*, 53 Am. St. Rep. 179-191.

PROCESS.—SERVICE OUTSIDE OF THE STATE of notice or process, when not authorized by law, is a nullity. Service beyond the state cannot authorize a personal judgment: *Wilson v. St. Louis etc. Ry. Co.*, 108 Mo. 588, 32 Am. St. Rep. 624. But service on a nonresident temporarily within the state confers jurisdiction: *Alley v. Caspari*, 80 Me. 234, 6 Am. St. Rep. 178.

OWENS v. WILMINGTON AND WELDON R. R. CO.

[126 North Carolina, 139.]

RAILROADS—LIABILITY FOR FALSE ARREST.—A railroad company is not liable for the false arrest of a passenger on one of its trains, where the conductor in charge of the train merely pointed out such passenger to a sheriff who had come to arrest him as a party suspected of a capital offense.

RAILROADS—DUTY TOWARD PASSENGER—PROTECTION FROM ARREST.—A railroad company must protect its passengers from assaults, insults, and ill-treatment of their fellow-passengers, strangers, and its own servants, but it is not required to protect them from arrest by officers of the law.

Civil action for damages for false arrest of the plaintiff while a passenger on the defendant's train.

Winston & Fuller, S. H. MacRae, and Boone, Bryant & Biggs, for the appellant.

George M. Rose and A. W. Graham, for the appellee.

¹⁴⁰ FAIRCLOTH, C. J. The plaintiff purchased a ticket in South Carolina over defendant's railroad to Selma, North Carolina, and was seated in defendant's car, and, without fault or blame in his deportment, was arrested on arrival at Fayetteville by the sheriff of Cumberland county and his armed posse, taken off the train and incarcerated for two days, when he was tried for an alleged crime, acquitted and discharged. Before the arrival of the train at Fayetteville, the sheriff was notified by telegram from the sheriff of Kingstree, South Carolina, that the plaintiff and two others were on that train, and that they were suspected of having committed a capital offense in South Carolina. The sheriff was directed in said telegram to "arrest them—conductor will point out." The plaintiff testified: "The conductor was in the car, sheriff and policemen, seven or eight, came in at each end of the car. Conductor was approached by the sheriff, and the sheriff and he were talking. I heard the conductor say, 'There are the men I have reference to.' When the sheriff arrested me the conductor was not in the car; after he and the sheriff finished talking the conductor went out on the platform. ¹⁴¹ The conductor did not tell the sheriff to arrest us." At the close of the plaintiff's evidence the court expressed the opinion that he could not recover, and there was nonsuit and appeal.

The plaintiff's contention is that he was entitled, as a passenger, to protection from arrest by the defendant's employes.

We are aware of no authority for his position, and we do not think the defendant's duty can be carried to such extent. That would make the defendant's train a sanctuary to which criminals could flee for protection.

It is well settled that a railroad is a common carrier, and that it has the right to establish reasonable rules and regulations for the government of its trains and passengers, and that it is its duty to do so and require its passengers to observe such regulations. The company must afford protection and safety to its passengers against assaults, insults and ill-treatment of their fellow-passengers or strangers, and its own servants. Although held to the highest degree of care, the company is not an insurer of the safety and life of the passenger, as it is for a package of goods committed to its care.

In the present case the defendant was wholly ignorant of the occurrence, and its conductor did not originate the cause or instigate or participate in the arrest. It would be vain and unreasonable to require him to resist an officer of the law, or the law itself. Whether the officer had authority or probable cause for making the arrest is not material. The conductor was confronted with a known officer of the law, with sufficient force to carry out his purpose.

Gillingham v. Ohio etc. R. R. Co., 35 W. Va. 588, 29 Am. St. Rep. 827, cited by the plaintiff's counsel, does not present the same question. The occurrence was a matter between the conductor and an innocent passenger. The conductor ordered the arrest and ¹⁴² actively participated in the execution of his order to the extent of expulsion, and the company was held liable. Such misapplication of decided cases, as authority, results from a disregard of the universal principle that the law must fit the facts in every case. We see no error in the trial.

Affirmed.

A CARRIER OF PASSENGERS BY RAIL, MUST PROTECT THEM against injury from the negligence or willful misconduct of its servants, and of their fellow-passengers or strangers so far as practicable: *Gillingham v. Ohio River R. R. Co.*, 35 W. Va. 588, 29 Am. St. Rep. 827. One of the obligations that a carrier assumes is that of protecting its passengers against insult or injury caused by the misconduct of its servants: Note to *Mulligan v. New York etc. Ry. Co.*, 26 Am. St. Rep. 543.

THE LIABILITY OF CARRIERS FOR FALSE ARREST and imprisonment is discussed in the monographic note to *Tryon v. Pingree*, 67 Am. St. Rep. 426, 427.

JORDAN v. GREENSBORO FURNACE COMPANY.

[126 North Carolina, 143.]

STATUTE OF FRAUDS—PLEADING.—IN ENGLAND the statute of frauds, 29 Charles II, does not affect the substance of contracts which come within its purview; hence, in order to take advantage of the statute a defendant must properly plead it.

STATUTE OF FRAUDS—HOW SET UP—PLEADING.—IN NORTH CAROLINA the statute of frauds affects the contract itself, and hence if the plaintiff declares upon a verbal promise, void under the statute, the defendant may either deny that he made the promise, or set up a different contract, or admit the promise and specially plead the statute, and testimony offered by the plaintiff to prove the promise is incompetent, and should be excluded on objection.

CONTRACTS—VOID—DAMAGES FOR BREACH.—An action cannot be maintained for damages for the breach of a void contract.

STATUTE OF FRAUDS—PAROL SALE OF LAND—BREACH—RECOVERY FOR IMPROVEMENTS.—A purchaser of real estate by parol may have compensation for improvements placed on the land, but damages cannot be recovered for the non-performance of such a contract.

APPEAL.—AN EXCEPTION TO EVIDENCE is sufficient when it appears in the statement of the case that objection was made to the evidence when it was offered, that the objection was overruled, and that an exception was then entered.

J. A. Barringer, A. M. Soales, Adams & Douglas, and J. N. Wilson, for the appellants.

Bynum & Bynum and King & Kimball, for the appellees.

144 MONTGOMERY, J. This action was brought to recover damages for the alleged failure of the defendants to execute a parol agreement alleged to have been entered into between the plaintiffs and defendants, by which the defendants were to lease to the plaintiffs, for a term greater than three years, the plant of the North Carolina Steel and Iron Company. The cause of action as set out in the plaintiff's complaint is stated substantially as follows:

1. That in the year 1895 the North Carolina Steel and Iron Company, a corporation, was unable to meet its indebtedness, amounting to twenty-six thousand dollars, and agreed to sell, and the plaintiffs agreed to buy, the plant and all its belongings for the amount of the indebtedness.

2. That before a meeting of the company was called to ratify the sale, J. M. Worth and his associates, defendants, represented to the plaintiffs that they, Worth and his associates, had contributed to the company a large amount of money,

which would be entirely lost to them by a sale to outsiders, ¹⁴³ and asked the plaintiffs to allow him and his associates to purchase the plant from the company.

3. That the plaintiffs had already expended a large sum in trying to effect a sale or lease of the property, and that various persons owning property near the plant had agreed to convey to plaintiffs a large number of valuable lots if the plaintiffs would put the plant in operation, and therefore the plaintiffs could not surrender their interest without some guaranty to receive a lease of it, after Worth and his associates should make the purchase.

4. That the defendants then agreed that if the plaintiffs would assign their interest, that he and his associates would lease for a term of five years, after a new company had been formed, to the plaintiffs upon their making a reasonable proposition, and that the plaintiffs agreed therefor to transfer their right to Worth and his associates and did so in writing, and asked the said company to sell and convey to defendants the property.

5. That the company thereupon sold and conveyed to Worth and his associates the entire plant, and they then organized the Greensboro Furnace Company, with Worth and his associates as incorporators.

6. That after the new company was formed the plaintiffs offered a reasonable proposition for a lease of the property according to the previous understanding, which the defendants accepted, but afterward refused to sign when the lease in writing was tendered.

The defendants in their answer denied the main allegations of the complaint, and especially the ninth paragraph, in which was alleged the parol agreement for the lease.

His honor was of opinion that the plaintiffs could recover damages for the amount which they had expended in trying ¹⁴⁶ to effect a sale or lease of the property for the company, and also damages for the loss of the lots which they would have received if they had leased the plant and put it in operation, that is, if the proof offered on those heads should satisfy the jury of the truth of the allegations, and he therefore allowed and received evidence on the part of the plaintiffs to prove the parol agreement for the lease of the plant of the company for five years to the plaintiffs. The evidence was objected to at

the time it was offered, and upon the objection being overruled, the defendants entered their exception.

We are of the opinion that his honor erred in the receiving of the evidence, because it was incompetent. It is true the statute of frauds was not specially pleaded in the answer, but the allegations of the complaint in reference to the parol contract of lease were denied, and upon that denial in the answer all testimony offered to prove the parol agreement should have been rejected. That part of our statute of frauds which concerns the lease or sale of land, section 1245 of the code, has changed somewhat the phraseology of the English statute, 29 Charles II, and that change has brought about a different construction on the part of our court from that of the English courts on the point before us. The courts of England have declared that the substance of contracts within the statute is not affected by the statute, but that whether they are to be enforced or not is dependent upon the enforcement of a rule of evidence, and therefore it is necessary in order to get the advantage of the statute that it should be properly pleaded. Our court, however, holds that the statute affects the contract itself, and therefore whenever one is required to prove the contract which he seeks to enforce (if it be one within the purview of the statute), he must show that it has been executed in contemplation of the statute, and that by legal evidence: ¹⁴⁷ Gulley v. Macy, 84 N. C. 434. The rule is that "where the plaintiff declares upon a verbal promise, void under the statute of frauds, and the defendant either denies that he made the promise or sets up another and different contract, or admits the promise and pleads specially the statute, testimony offered to prove the promise is incompetent, and should be excluded on objection": Holler v. Richards, 102 N. C. 545, and cases there cited.

But the plaintiff's counsel insisted that this action is not brought to enforce the contract or to have specific performance, but to recover damages because of the refusal of the defendants to execute in due form the parol agreement of lease. That is true, but the plaintiffs cannot recover damages for a violation of a void contract. In Wade v. Newbern, 77 N. C. 460, the city had agreed by parol to make a lease of certain real estate for ten years to the plaintiff, and, on a refusal to sign the lease, the plaintiff declared on a breach of contract and for damages for the breach, and this court said: "Whether

the city is liable to one who has bona fide performed labor under a void contract is a question which does not arise here. The complaint is for a breach of contract, and the prayer is for damages resulting from the breach on the part of the defendant. The position is too plain for doubt that an action cannot be maintained for damages for the breach of a void contract."

In *McCracken v. McCracken*, 88 N. C. 272, the court said, after reciting the principle on which *Albea v. Griffin*, 22 N. C. 9, was decided, that is, that a purchaser of real estate by parol should have compensation for improvements put upon the land, because it would be against conscience to permit the owner, in such a condition, to enjoy the fruits of another's labor or the expenditure of another's money, and thus benefit himself to the hurt of another: "But neither in ¹⁴⁸ that case nor in any other in which its principles have been adopted—and there are many such—is there even a suggestion to be found that an action can be sustained in any form or in any court, whether at law or in equity, for damages for the nonperformance of such a contract. And that is simply what this action is, nothing more nor less. To permit it to be done would be for the courts to act in the very teeth of the statute in defiance of the declared will of the legislature."

Our court has gone no further than the case of *Albea v. Griffin*, 22 N. C. 9, in the line of granting compensation to injured parties under parol contracts to convey land, and surely this case does not touch that in any respect. The plant of the defendant company has not been benefited or improved with the plaintiff's money to the amount of a cent. According to the plaintiff's statement, which is denied by that of the defendants, the plaintiffs trusted to the word of the defendant and have been damaged pecuniarily, as they allege. Whatever loss they may have sustained they must bear, for the contract was about a subject matter which the law required to be in writing, and which we have seen was not.

The plaintiffs made a motion in this court to dismiss the appeal because the exceptions to the evidence were not specifically assigned as error in the conclusion of the case on appeal. It was not necessary to have made such an assignment of error. It appeared in the statement of the case that objection was made to the evidence when it was offered, that the objection was overruled, and that the defendants' exception was then en-

tered. That was sufficient, and no case can be found in our decisions to the contrary.

New trial.

Douglas, J., did not sit on the hearing of this appeal.

When and How the Statute of Frauds Must be Plead.*

Plaintiff's Pleadings.—The statute of frauds merely introduces a new rule of evidence, and does not alter or affect the rules of pleading. For this reason the rule is universal, at least where it has not been changed by statute, that where an action is founded upon a contract which at common law is valid without writing, but which by the statute of frauds is required to be in writing, the declaration or complaint need not allege or take notice of the writing: *Whitehead v. Burgess*, 61 N. J. L. 75. As was said in *Price v. Weaver*, 13 Gray, 272: "The statute of frauds has not altered the rules of pleading, in law or equity. A declaration on a promise which, though oral only, was valid by the common law, may be declared on in the same manner since the statute as it might have been before. The writing is matter of proof, and not of allegation." It is sufficient for a plaintiff to allege the contract generally without stating whether it is in writing. The contract and its written character are matter of proof. At the hearing the allegations of the complaint must be sustained by competent evidence: *Piercy v. Adams*, 22 Ga. 109; *Mullaly v. Holden*, 123 Mass. 583; *Dayton v. Williams*, 2 Doug. (Mich.) 31; *Benton v. Schulte*, 31 Minn. 312; *Taylor v. Penquite*, 35 Mo. App. 389; *Cranston v. Smith*, 6 R. I. 231; *Harris Photographic Co. v. Fisher*, 81 Mich. 136; *Horn v. Shamblin*, 57 Tex. 243; *Ecker v. Bohn*, 45 Md. 278; *Carroway v. Anderson*, 1 Humph. 61; *Walker v. Richards*, 39 N. H. 259.

The court will presume that the contract was in writing, where the nature of the agreement is such that it could not be valid unless in writing, unless it appears from the face of the complaint that the agreement was verbal: *Bowman v. Ainslie*, 1 Idaho, 644; *Stearns v. Lake Shore etc. Ry. Co.*, 112 Mich. 651; *Gale v. Harp*, 64 Ark. 462; *Lupeau v. Brainard*, 20 N. Y. App. Div. 212. There is no presumption of law that the contract is oral: *Sweetland v. Barrett*, 4 Mont. 217. After verdict it will be presumed that the contract was proved to be in writing: *Elting v. Vanderlyn*, 4 Johns. 237. The same rule of pleading prevails under the code system as at common law: *Bradford Inv. Co. v. Joost*, 117 Cal. 204; *McMenomy v. Talbot*, 84 Cal. 279. In Indiana the rule has been changed by statute, and if a contract is required to be in writing, the plaintiff must allege in his complaint that it is in writing. If the plaintiff fails to state this, the contract will be presumed to be

*REFERENCE TO MONOGRAPHIC NOTES.

When and how the statute of frauds must be pleaded: 86 Am. Dec. 684-688.

by parol: *Langford v. Freeman*, 60 Ind. 46; *Pulse v. Miller*, 81 Ind. 190. And section 3561, subdivision 6, of the Iowa code expressly makes it a ground of demurrer if the complaint fails to show that a contract is in writing where the law requires it to be so evidenced. In Kentucky no judgment can be given on a verbal contract within the statute, even if no defense is made: *Hocker v. Gentry*, 8 Met. (Ky.) 468.

If the plaintiff claims under an oral contract which is within the statute of frauds, and he relies upon certain facts which will take it out of the operation of the statute, he should allege those equities which show the contract to be enforceable notwithstanding the provisions of the statute, and a failure to state such facts in the complaint will render such pleading vulnerable to a demurrer: *Burden v. Knight*, 82 Iowa, 584; *Babcock v. Meek*, 45 Iowa, 137. Hence in a suit for specific performance of a contract for the sale of lands, where the contract is not in writing, the plaintiff, who relies upon a part performance to take the case out of the statute, must expressly state in his bill the facts upon which he relies: *Meach v. Stone*, 1 D. Chip. 182, 6 Am. Dec. 719. The reason being that a complainant must, in his bill, put in issue whatever he intends proving, otherwise the evidence will be excluded: *Small v. Owings*, 1 Md. Ch. 363. And this case seems to be authority for the proposition that the plaintiff must plead such equitable facts which obviate the effect of the statute, even though the defendant admits the oral agreement. A general allegation that the plaintiff "has offered, and has always been ready and willing to comply with his contract," but which fails to state the facts, is insufficient: *Hart v. McClellan*, 41 Ala. 251. An allegation of the payment of the purchase money is not sufficient to take the case out of the statute: *Underhill v. Allen*, 18 Ark. 466; neither is an allegation that the vendee entered upon the premises and made valuable improvements; the acts which constitute the part performance should be clearly and distinctly stated in the complaint: *Fowler v. Sutherland*, 68 Cal. 414.

If the defendant sets up as a defense a contract by way of release or counterclaim or otherwise, and such contract is required to be in writing, the plaintiff should, in his reply, set up the statute of frauds if he intends to rely upon it. He may raise the defense of the statute either by a special plea to that effect, or by a general denial of the oral contract set up in the answer: See *Hurt v. Ford* (Mo.), 36 S. W. Rep. 671; *Hurt v. Ford*, 142 Mo. 283. In Illinois, it seems that a complainant in equity, who wishes to rely upon the statute of frauds to defeat a defense set up in the answer, cannot do so by a general replication. Formerly, he could do so by special replication, but this form of pleading not being used any more, he must take advantage of the statute by amending his bill, so as to anticipate and avoid the defense. A general replication waives the defense: *Tarleton v. Vietes*, 1 Gilm. 470, 41 Am. Dec. 193. A failure

to set up the statute by some proper method operates as a waiver of the defense: *Hurt v. Ford* (Mo.), 36 S. W. Rep. 671. Where, however, a plaintiff is not required to reply to any matter of defense set up in the answer, he may rely upon the defense of the statute of frauds without pleading it: *Steed v. Harvey*, 18 Utah, 367, 72 Am. St. Rep. 789.

Pleading by the Defendant—In General.—It may be stated as a rule of general application that the defense of the statute of frauds to be urged by a defendant must be raised by some appropriate pleading. It does not raise itself. But this does not mean in every case, or even usually, that the defendant is required to raise this defense by a special plea directed against the statute. The statute of frauds does not render a contract void which fails to comply with its provisions; it is simply voidable at the election of the party against whom it is sought to be enforced. Hence such party may waive the benefit of it, and by failure to raise this defense by a proper pleading, the contract may generally be proved by parol evidence. An exception to this rule would seem to exist in cases of trust, since the statute, in some jurisdictions, renders the trust absolutely void unless it is evidenced by a writing. Hence it is said that in such a case the defendant is not required to plead the statute as he is where a contract is involved: *Browne's Statute of Frauds*, sec. 508. But it would seem that even in cases of trust, if the defendant in his answer admits a trust, it can be enforced against him unless he specially pleads the statute, because the admission over his own signature of the trust supplies the original deficiency, and there is sufficient writing to satisfy the statute: *Rogers v. Rogers*, 20 R. I. 400. Statements are occasionally met in the reports which might indicate that no pleading of the statute on the part of the defendant is required. And where the statute renders the agreement void, as would appear to be the case in *Givens v. Calder*, 2 Desaus. 172, 2 Am. Dec. 686, the same rule would apply as in the case of trusts. But even in such a case an admission of the contract by the defendant would probably require him to specially plead the statute. Certainly this case of *Givens v. Calder*, 2 Desaus. 172, 2 Am. Dec. 686, does not establish the general rule that a defendant need not raise the defense of the statute by some allegation or denial in his pleading. Such statements as may be found in *Morrison v. Baker*, 81 N. C. 76, and in similar cases, that the statute need not be pleaded in order to be relied upon as a defense, mean simply that the statute is not required to be pleaded specially—that is, to raise the objection does not demand a pleading directed solely to that end, but it may be raised by any appropriate pleading, as, for example, a denial of the contract sued upon. *Coxart v. West Oxford Land Co.*, 113 N. C. 294, recognizes in direct terms the necessity of pleading the statute; and such cases as *Browning v. Berry*, 107 N. C. 231, and *Holler v. Richards*, 102 N. C. 545, show in what manner the defendant may by his pleadings raise

the objection that the agreement is not in writing. In both of these cases it is shown that the defendant may avail himself of the defense, and prevent the introduction of oral evidence to prove the contract, by denying the contract, or by setting up affirmatively another and different contract, or by admitting the alleged contract and specially pleading the statute. It may be stated as a general rule that a defendant cannot, at the trial, avail himself of the defense of the statute unless in his answer he denies the contract, or admits it and pleads the statute specially: *Bless v. Jenkins*, 129 Mo. 647. The code of Iowa, section 3666, specifically confers on a plaintiff the right to enforce an oral contract sued upon if the defendant fails to deny it in his pleadings: *Benedict v. Bird*, 103 Iowa, 612. Yet there are some states in which this defense can be availed of only where the party specially sets it up in a pleading directed solely to that end. In these jurisdictions a general denial of the contract sued upon is wholly insufficient as a pleading to raise the defense. In Alabama, for example, the defense must be raised by a separate plea or by specially pleading the statute in the answer, and it cannot be raised by a simple denial of the contract sued upon: *Martin v. Blanchett*, 77 Ala. 288; *Bolling v. Munchus*, 65 Ala. 558; *Bailey v. Irwin*, 72 Ala. 505. This seems to be the result of a statute, however, which provides that "in all suits where the defendant relies on a denial of the cause of action as set forth by the plaintiff, he may plead the general issue, and in all other cases the defendant must briefly plead specially the matter of defense": *Brigham v. Carlisle*, 78 Ala. 243, 56 Am. Rep. 28. This case admits the common-law rule to be different, and that in the absence of this statute the defense could be insisted upon under a plea of the general issue. In some other states there may be doubt as to the particular method of raising the defense by a pleading. In *Wickham v. Hyde Park etc. Assn.*, 80 Ill. App. 523, for example, it would appear that in Illinois the defense could only be raised by a special plea. And other Illinois cases intimate a similar rule. In *Tarleton v. Vietes*, 1 Gilm. 470, 41 Am. Dec. 193, it was said that in a suit in equity the defense of the statute would be deemed waived unless it was specially insisted on in the pleadings. On the other hand, the statement is frequently seen that the defense of the statute is waived only when the defendant fails to plead it or in some way neglects to expressly rely upon it during the trial: *Chicago etc. Co. v. Davis etc. Co.*, 142 Ill. 171; *Hogan v. Easterday*, 58 Ill. App. 45; *Sanford v. Davis*, 181 Ill. 570; *Thornton v. Vaughan*, 3 Ill. 218; *Lear v. Chouteau*, 23 Ill. 37 (*39). Whether under these decisions a defendant would be permitted to rely upon this defense under a general denial may be doubted. A plaintiff cannot take advantage of the statute under a general replication to the answer: *Tarleton v. Vietes*, 1 Gilm. 470, 41 Am. Dec. 193. And reasoning from this decision it would seem to follow logically that a defendant could not urge the same defense under a general denial, but must specially

insist upon it in his pleadings. This is probably the Illinois rule. A similar rule was established in Tennessee by the case of *Citty v. Manufacturing Co.*, 93 Tenn. 276, 42 Am. St. Rep. 919, where the question was directly passed upon, as to whether a defendant could take advantage of the defense under a general denial by objecting to parol evidence to prove the contract. In denying this right, and insisting that the defendant should specially insist upon the statute if he intended to rely upon it, the court said: "At the present time our holding is that such contracts are voidable merely, at the option of either party, and not void. In view of this holding, we are of opinion the better practice is to require the statute of frauds to be specially pleaded whenever it is desired to rely upon it as a defense. To allow the defendant to proceed with his defense and speculate upon his chances of a successful opposition until a large bill of cost has accumulated, and then, when he finds the chances against him, to permit him to interpose the statute, would be an unreasonable advantage to him at the expense of the plaintiff. If the contract is voidable under the statute, and the defendant intends to rely upon that fact and avoid it, it is just that he should so notify the plaintiff, to the end that the litigation may end. If he does not rely upon the statute in his pleading, it is but just that the contract be enforced. The mere denial of the contract is not equivalent to denying its validity and legality, since the contract may have been made, and still be invalid and voidable under the statute." This case was approved in *Barnes v. Coal Co.*, 101 Tenn. 354. A similar rule would seem to prevail in Maine: *Farwell v. Tillson*, 76 Me. 227. But see *Lawrence v. Chase*, 54 Me. 196, where it would seem that the defense might be raised under the general issue. See, also, *Fee v. Sharkey* (N. J.), 44 Atl. Rep. 673. In Arkansas, under a code provision that every material allegation of a complaint is taken to be true unless it is specifically controverted by the answer, it is held that a general denial of the allegations of a complaint is not sufficient to raise the defense of the statute of frauds; the defendant must specially plead it in his answer: *Gwynn v. McCauley*, 32 Ark. 97. Many cases in other jurisdictions frequently suggest the same rule, but upon examination they will disclose that the defense was not raised by any proper pleading, and not that it was necessary to specially plead the statute in order to rely upon its terms. These cases will be noticed later.

Common Counts.—Even in those states where the statute of frauds must generally be specially pleaded to be available as a defense, an exception is recognized where the action is based upon the common counts. Hence, where the common counts only are filed as a declaration or complaint, it is not necessary to plead the statute specially: *Schotte v. Puscheck*, 79 Ill. App. 31; *Lynch v. Scroth*, 50 Ill. App. 668; *Alger v. Johnson*, 4 Hun, 412; *Harris v. Frank*, 81 Cal. 280; *Hunter v. Randall*, 62 Me. 423, 16 Am. Rep. 490. In such a case the plaintiff does not disclose the nature of his claim, and the defendant cannot anticipate the necessity of meeting a claim which

comes within the prohibition of the statute: *Hunter v. Randall*, 62 Me. 423, 16 Am. Rep. 490; *Mitchell v. Miller*, 25 Misc. Rep. 179; 54 N. Y. Supp. 180; *Durant v. Rogers*, 71 Ill. 121; *Boston Duck Co. v. Dewey*, 6 Gray, 446. For this reason the defense of the statute need not be pleaded by a defendant in such a case.

Demurrer.—The benefit of the statute of frauds as a defense can be taken by demurrer, when it affirmatively appears from the complaint that the agreement relied upon is not evidenced by a writing duly signed: *Dicken v. McKinley*, 163 Ill. 318, 54 Am. St. Rep. 471; *Speyer v. Desjardins*, 144 Ill. 641, 36 Am. St. Rep. 473; *Randall v. Howard*, 2 Black, 585; *White v. Levy*, 93 Ala. 484; *Baillie v. Plant*, 11 Misc. Rep. 30; 31 N. Y. Supp. 1015; *Richards v. Richards*, 9 Gray, 313. But the complaint must set out a parol promise in order to make a demurrer the proper pleading by which to raise the defense: *Lawrence v. Chase*, 54 Me. 196. The fact that the agreement rests in parol must affirmatively appear from the face of the complaint: *Strouse v. Elting*, 110 Ala. 132. It is not sufficient that it does not appear from the complaint whether or not the contract is in writing: *Draper v. Macon Dry Goods Co.*, 106 Ga. 661, 68 Am. St. Rep. 136. A failure to state that the agreement is in writing does not render the complaint demurrable: *Piercy v. Adams*, 22 Ga. 109; for the reason that the contract alleged is presumed to be in writing, the law raising a presumption that the statute of frauds has been complied with: *Speyer v. Desjardins*, 144 Ill. 641, 36 Am. St. Rep. 473; *Bluthenthal v. Moore*, 106 Ga. 424. We have already seen that it is sufficient in a pleading on the part of the plaintiff to allege the contract generally, without stating whether it is oral or written; hence a failure to state that it is in writing cannot be a ground of demurrer: *Richerson v. Moody*, 17 Tex. Civ. App. 67. In Indiana, on the other hand, the complaint must state whether the contract is in writing or not, and upon a failure to so state it will be presumed that the agreement was oral. Hence it need not appear on the face of the complaint that the agreement was oral in order to render it vulnerable to a demurrer, that fact being presumed in the absence of a contrary statement: *Pulse v. Miller*, 81 Ind. 190. In Iowa, a defendant must demur to the complaint where it appears on its face that the agreement was oral. And a failure to demur operates as a waiver of the defense of the statute. It cannot subsequently be set up in the answer: *Wiseman v. Thompson*, 94 Iowa, 607. In North Carolina the peculiar rule prevails that the defense of the statute cannot be raised by a demurrer, because a demurrer admits the contract, and a simple admission of the contract constitutes a waiver of the statute: *Hemmings v. Doss*, 125 N. C. 400. A similar view was urged by counsel in *Burden v. Knight*, 82 Iowa, 584, but the court very properly characterized this "a mistaken view of the issue raised by a demurrer. It is useless to discuss this question."

General Denial.—Probably the most frequent method in this country of raising the defense of the statute of frauds is by a general

denial in the answer. Outside of a few jurisdictions an answer denying the contract sued upon is sufficient to let in this defense. In this respect the weight of judicial authority in this country supports the doctrine of the principal case: See *Buhl v. Stephens*, 84 Fed. Rep. 922; *Busick v. Van Ness*, 44 N. J. Eq. 82; *Metcalf v. Brandon*, 58 Miss. 841; *Tatge v. Tatge*, 84 Minn. 272; *Dunn v. Moore*, 8 Ired. Eq. 364; *Allen v. Chambers*, 4 Ired. Eq. 125; *State v. Water Works etc. Co.*, 74 Mo. App. 273; *Boyd v. Paul*, 125 Mo. 9; *Hackett v. Watts*, 138 Mo. 502; *Porter v. Citizens' Bank*, 73 Mo. App. 513; *Wiswell v. Tefft*, 5 Kan. 283; *Coquillard v. Suydam*, 8 Blackf. 24; *Suman v. Springate*, 67 Ind. 115. Where the defendant in his answer denies the contract, the plaintiff must produce legal evidence of the existence of the agreement, which means a writing, since it cannot be established by parol proof: *Bernhardt v. Walls*, 29 Mo. App. 206; *Kay v. Ourd*, 6 B. Mon. 100; *Hocker v. Gentry*, 3 Met. (Ky.) 463; *Ontario Bank v. Root*, 3 Paige, 478.

The denial must be sufficient in order to raise the point. But a denial that the defendant made any lawful contract upon the terms alleged is sufficient to put the plaintiff upon proof of the contract by competent evidence: *Mahana v. Blunt*, 20 Iowa, 142. A mere denial of the contract sued upon is sufficient to raise the defense either at law or in equity: *Feeney v. Howard*, 79 Cal. 525, 12 Am. St. Rep. 162; *Cozine v. Graham*, 2 Paige, 178; *May v. Sloan*, 101 U. S. 231; *Whiting v. Gould*, 2 Wis. 552. Under the plea of not guilty in an action of trespass to try title, a defendant may avail himself of the statute as a defense: *Johnson v. Flint*, 75 Tex. 379. The same defense may be urged under a general denial in replevin: *Van Dyke v. Clark*, 19 N. Y. Supp. 650. In Arkansas, where we have seen the statute must be specially pleaded, there are earlier cases which deemed the defense available under a general denial: *Wynn v. Garland*, 19 Ark. 23, 68 Am. Dec. 190; *Trapnall v. Brown*, 19 Ark. 39. And in Tennessee, where the statute must be specially pleaded, the court has engrafted one exception onto this rule, which is, that where the defendant repudiates and disaffirms the contract in his pleadings, he is not required to specially plead the statute. And this for the reason that "the complainant has all the notice in such case that he would have if a formal plea was interposed": *Graham v. Weaver*, 97 Tenn. 485. In Massachusetts, while generally it seems that a defendant must specially plead the statute to avail himself of it as a defense (*Middlesex Co. v. Osgood*, 4 Gray, 447), yet if the plaintiff alleges a contract in writing and the defendant denies this, the defense of the statute of frauds is available under such denial: *Reid v. Stevens*, 120 Mass. 209.

A defendant, after he has reserved his right to interpose the defense of the statute of frauds by a denial of the contract sued upon, is still obliged to make his defense good by objecting to the parol evidence which is sought to be introduced by the plaintiff to prove the contract: *Crough v. Nurge*, 44 N. Y. App. Div. 19; *Clement v.*

Gill, 59 Mo. App. 482; Cosand v. Bunker, 2 S. Dak. 294. And a failure to object to parol evidence when it is introduced operates as a waiver of the statute: Miller v. Harper, 63 Mo. App. 293; Montgomery v. Edwards, 46 Vt. 151, 14 Am. Rep. 618; Pike v. Pike, 69 Vt. 535. But a failure to object to the introduction of evidence of a parol agreement will not amount to a waiver of the defense of the statute, where the statute has been specially and properly pleaded as a defense: Thomas v. Churchill, 48 Neb. 266. And a similar exception is recognized where the plaintiff pleads facts which, if established, would show the contract to be valid because embraced within some of the exceptions of the statute. The reason why a failure to object to oral evidence does not, in such a case, constitute a waiver, is because it is discretionary with the plaintiff in what order he will introduce his proof, and the defendant cannot tell until the plaintiff's case is closed whether he will prove himself within some of the exceptions stated in the statute or not: Benedict v. Bird, 103 Iowa, 612. The general rule, however, is firmly established that under a denial of the contract a defendant must object to the introduction of parol evidence to prove the contract. If he fails to object, the defense is not available to the defendant upon a motion for a nonsuit based upon the statute of frauds, and made at the end of the trial: Lupean v. Brainard, 20 N. Y. App. Div. 212; Clement v. Gill, 59 Mo. App. 482. Neither can a defendant at the end of the trial apply for leave to amend his answer so as to set up therein the defense of the statute: Simis v. Wissel, 10 N. Y. App. Div. 323; Lupean v. Brainard, 20 N. Y. App. Div. 212. And it seems that at the close of the trial a defendant is not in a position to take advantage of the statute in any manner, where his rights have been waived up to that time: Barrett v. Johnson, 77 Hun, 527.

In some states, notably New York, there appears to be at least one case in which the defense of the statute is not available under a general denial, but the defendant is required to specially plead this defense in order to preserve his rights. Such a case arises where an action is brought on an oral contract within the statute of frauds, but the complaint fails to disclose the nature of the contract, whether oral or written. Under such circumstances the defendant is required to specially plead the statute in order to avail himself of the objection: Matthews v. Matthews, 154 N. Y. 288; Hamer v. Sidway, 124 N. Y. 538, 21 Am. St. Rep. 693; Honsinger v. Mulford, 90 Hun, 589; Smith v. Slosson, 89 Hun, 568; Pohl v. Pontier, 21 N. Y. Supp. 634; 2 Misc. Rep. 143; Randolph v. Frick, 50 Mo. App. 275; Tynon v. Despain, 22 Colo. 240. The reason for such a rule was stated thus in Matthews v. Matthews, 154 N. Y. 288: "The mere denial in the answer of the contract alleged in the complaint, when the character of the contract is not disclosed, is quite consistent with an intention to put in issue simply the fact whether an agreement was entered into, either oral or written. One of the rules established by the English judicature act, as amended in 1873, ordained

that 'where a contract is alleged in any pleading, a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract, and not of its legality or its sufficiency in law, whether with reference to the statute of frauds or otherwise.' The statutory rule enacted by the English judicature act was regarded by this court in *Crane v. Powell*, 139 N. Y. 379, as declaring the true rule independently of statute. The mere denial in the answer in the present case of the contract alleged in the complaint did not, therefore, raise any question under the statute of frauds, and it could not be raised by objection on the trial, to the proof of the oral contract, for the very conclusive reason that the statute must be pleaded before the validity of the contract on that ground can be assailed." In view of this case and of *Crane v. Powell*, 139 N. Y. 379, it may be doubted whether at the present time in New York the defense of the statute of frauds is available to a defendant in any case under a mere denial in his answer of the contract sued upon. It would seem, however, that if the contract sued upon was alleged to be in writing, a simple denial would be sufficient to raise the issue, and would compel the plaintiff to prove the agreement by competent evidence: See *Amburger v. Marvin*, 4 E. D. Smith, 393; *Traver v. Purdy*, 25 N. Y. Supp. 452; 72 Hun, 639; 80 Abb. N. C. 443, and cases cited. But it has been stated that the defense of the statute of frauds cannot be made available in an action unless it is pleaded as a defense or presented by the averments of the complaint: *Wells v. Monihan*, 129 N. Y. 161; *Crane v. Powell*, 19 N. Y. Supp. 220; *Doyle v. Beaupre*, 17 N. Y. Supp. 287; 63 Hun, 624. And the tendency in New York undoubtedly is to require a defendant to specially plead the statute, unless its invalidity appears from the face of the complaint, in which case the objection can be taken by demurrer: *Crane v. Powell*, 139 N. Y. 379. A similar uncertainty appears to prevail in Colorado. The latest expression of the supreme court of that state would seem to deny a defendant's right to object to oral evidence under a denial of the contract, and require that he should specially plead the statute in order to establish his defense: *McLure v. Koen*, 25 Colo. 284; *Tynon v. Despain*, 22 Colo. 240. But *Salomon v. McRae*, 9 Colo. App. 23, recognizes the more practical doctrine that the defense of the statute is a matter of evidence rather than of pleading, and that ordinarily it may be urged under a general denial.

The exception which we have noted to the general rule, namely, that a defendant cannot, under a general denial, avail himself of the benefit of the statute of frauds where the complaint fails to show whether the contract was in writing or not, is probably not the general rule, though the question seems not to have been a matter of frequent adjudication. In *Moody v. Jones* (Tex.), 87 S. W. Rep. 379, it was directly passed upon, and the court held that where a defendant, by his answer, denies making the contract sued upon, he is entitled to have only legal evidence offered in support thereof,

without specially pleading the statute. This decision would undoubtedly meet the approval of most of the courts where the defense of the statute is, under any circumstances, available to a defendant under a general denial.

If the Contract is Admitted, the Statute of Frauds Must be Specially Plead.—This is the only case in which the authorities are unanimous in holding that the statute must be specially pleaded if the defendant wishes to rely upon it as a defense. The statute of frauds has the effect of making a contract voidable only. The party to be charged may waive the protection of the statute if he desires, and an admission of the contract by a defendant in his answer, and a failure to claim the benefit of the statute specially, will operate as a complete waiver of the benefit of the statute: See *Burt v. Wilson*, 28 Cal. 632, 87 Am. Dec. 142; *Abba v. Smyth* (Utah), 50 Pac. Rep. 756; *Barrett v. McAllister*, 33 W. Va. 738; *Salomon v. McRae*, 9 Colo. App. 23; *Duffy v. O'Donovan*, 46 N. Y. 223; *Hollingshead v. McKenzie*, 8 Ga. 457; *Winn v. Albert*, 2 Md. Ch. 169; *Lewin v. Stewart*, 10 How Pr. 509; *Vaupell v. Woodward*, 2 Sand. Ch. 143; *Whiting v. Gould*, 2 Wis. (*552) 404; *Battell v. Matot*, 58 Vt. 271; *Metcalf v. Brandon*, 58 Miss. 841. The same rule exists both at law and in equity: *Iverson v. Cirkel*, 56 Minn. 299. The fact that the defendant admits the making of the contract does not deprive him of the benefit of the statute if he wishes to take advantage of it: *Ashmore v. Evans*, 11 N. J. Eq. 151; *Barnes v. Teague*, 1 Jones Eq. 277, 62 Am. Dec. 200. It is not necessary that the existence of the parol contract should be denied in pleading: *Thomas v. Churchill*, 48 Neb. 266. The confession of a parol promise is not a confession of any cause of action, either at law or in equity: *Thompson v. Jamesson*, 1 Cranch C. C. 295. But if the defendant does admit the contract, he is compelled to specially set up the statute in order to rely upon it. It is a sufficient admission if the answer admits substantially the same contract set out in the complaint: *Connor v. Hingtgen*, 19 Neb. 472. But the contract admitted and the one sued upon must be substantially the same. Hence, where there is a material and essential difference between the contract alleged in the bill and that admitted in the answer, the case is as though the answer had wholly denied the making of the contract: *Barrett v. McAllister*, 33 W. Va. 738; and the defendant is not required to specially plead the statute: *Gulley v. Macy*, 84 N. O. 484. It is not a sufficient denial of the contract, or a sufficient pleading of the statute of frauds, for a defendant to admit in substance the contract, and deny that he was equitably or morally bound to carry out the agreement: *Battell v. Matot*, 58 Vt. 271.

Sufficiency of Special Pleadings.—In a suit to enforce an oral contract for the sale of lands, the statute of frauds is sufficiently pleaded where the answer avers that the contract is not in writing, and states facts sufficient to show that the protection of the statute is sought: *Wright v. Raftree*, 181 Ill. 464. And a pleading is suffi-

clent which avers that the gift sought to be enforced is a parol one; that it is obnoxious to the provisions of the statute of frauds, and that the gift is of no avail and is void as against the defendant: *Schoonmaker v. Plummer*, 139 Ill. 612. But a mere reference to the statute is wholly insufficient: *Wolfskill v. Douglas* (Cal., Feb. 7, 1900), 59 Pac. Rep. 987. A pleading should expressly aver that the contract is not in writing: *Bean v. Valle*, 2 Mo. 126. It is not sufficient to allege that an account based on an agreement is barred by the statute; the facts relied upon as a defense must be set out: *Dinkel v. Gundelfinger*, 35 Mo. 172. Where the defense to a contract is that it was not in writing, the answer must set up such defense as a fact, and put it distinctly in issue. A statement that the contract is void in law and that the defendant is not bound to perform the same is insufficient: *Vaupell v. Woodward*, 2 Sand. Ch. 143. A plea that the note sued on "was given in consideration of a sale of land not evidenced by writing," is not a plea setting up the statute of frauds, but is merely a plea of want or failure of consideration: *Edelin v. Clarkson*, 3 B. Mon. 31, 38 Am. Dec. 177. An admission of the contract, coupled with a denial that the defendant was equitably or morally bound to carry out the agreement, is not a sufficient plea of the statute: *Battell v. Matot*, 58 Vt. 271.

HENDRICKS v. WESTERN UNION TELEGRAPH CO.

[126 North Carolina, 304.]

APPEAL—INCOMPETENT QUESTION.—IT IS HARMLESS ERROR to permit an incompetent question to be asked a witness, where the witness answers that he did not know, since the answer is more favorable to the opposite party than if the question had been excluded, because it prevents any unfavorable inference.

TELEGRAPH COMPANIES—LIABILITY FOR NONDELIVERY.—A telegraph company, which receives a message for delivery and fails to deliver it with reasonable diligence, becomes prima facie liable, and the burden rests upon it of alleging and proving such facts as it relies upon to excuse its failure.

TELEGRAPH COMPANIES—DELAY IN DELIVERY—LIABILITY.—The failure of a telegraph company to deliver a message within a reasonable time is equivalent to nondelivery, so far as the principle of liability is concerned, although the length of the delay may in certain cases affect the quantum of damages.

TELEGRAPH COMPANIES—RULES—NOTICE TO SENDER OF MESSAGE.—A rule of a telegraph company relating to the delivery of messages, made without notice to those who are to be affected by it, and which is not observed by the company itself, affords no protection against liability for failure to deliver.

TELEGRAPH COMPANIES—NOTIFYING SENDER OF NONDELIVERY OF MESSAGE—NEGLIGENCE.—It is the duty of

a telegraph company, in all cases where it is practicable to do so, to promptly inform the sender of a message that it cannot be delivered. A failure to do so is evidence of negligence, though it may not be negligence per se.

JURY TRIAL.--A jury has, in all cases, the constitutional right to pass upon the weight and credibility of the testimony.

TRIAL--QUESTIONS OF LAW AND FACT.--What is due diligence or reasonable care is generally, if not always, a mixed question of law and fact.

Action to recover damages for the negligent failure of the defendant to deliver two telegrams sent to the plaintiff. The messages were sent to Gaffney, South Carolina, in care of the Gaffney Cotton Mills, where the plaintiff was employed. Plaintiff lived at Gaffney, South Carolina. Plaintiff was well known at the mills and other places of business in the town. The first message was given to a twelve year old boy to deliver, who went to the Gaffney mill to inquire for the plaintiff, and was told to go through the mill and look for him. He only went through a part of it, and not the part where the plaintiff worked. He made inquiries of four or five persons at the mill, and made other inquiries in a few places in town, and, failing to find the plaintiff, he returned to the telegraph office. No service message was sent from the receiving office at Gaffney to the sending office at Lincolnton saying that the first message could not be delivered. The defendant objected to the following question asked of one of the witnesses: "Could you have found out from the plaintiff's family that lived in Gaffney, if you had been informed that the telegram had not been delivered?" The defendant excepted to the court's refusal to give the following instructions: 1. That if the defendant company made due inquiry for the addressee at Gaffney Cotton Mills, in whose care the message was sent, and failed to find him there, they used due diligence, and, unless negligent in other respects, they were not negligent in delivering the message; 2. The defendant was not negligent in failing to send a message asking for a better address, unless they believe that by sending such message the company could have obtained a better address. The defendant excepted to the court's giving the following instructions on behalf of the plaintiff: 1. The fact that the messages were addressed in care of the Gaffney Cotton Mills, and that the defendant inquired there for the plaintiff, and was told he was not there, did not excuse it from making diligent inquiry in Gaffney for his whereabouts; 2. If the plaintiff at this time lived in Gaffney, it was the defendant's duty to make inquiry

at his residence, and a failure to do so is negligence; 3. It was the defendant's duty to make inquiry at the postoffice for the plaintiff, if he had been receiving mail at the postoffice for some time; 4. It was the duty of the defendant's operator at Gaffney, if the message could not be delivered, to notify the operator at Lincolnton, so that the latter could get a better address or additional information of the plaintiff's whereabouts, unless the jury find that by so notifying the operator at Lincolnton, the defendant could not have obtained a better address.

Jones & Tillett, for the appellant.

Burwell, Walker & Cansler, for the appellee.

⁸⁰⁹ DOUGLAS, J. The first exception cannot be sustained. The question was competent, but in any event was harmless, as the witness answered that he did not know. Where a party is seeking to prove a fact, and the witness answers that he does not know, the answer is in fact more favorable to the opposite party than if the question had been excluded, because it prevents any unfavorable inference. The point so clearly presented and elaborately discussed, whether the defendant company was bound to make inquiries beyond the local limits of free delivery, does not appear to arise in this case, in the view we take of it. It is well settled that where a telegraph company receives a message for delivery and fails to deliver it with reasonable diligence, it becomes *prima facie* liable, and that the burden rests upon it of alleging and proving such facts as it relies upon to excuse ⁸¹⁰ its failure: *Sherrill v. Western Union Tel. Co.*, 116 N. C. 655; 117 N. C. 352; *Gray on Communication by Telegraph*, sec. 26; *Thompson on Electricity*, sec. 274, and cases therein cited. The failure to deliver within reasonable time is equivalent to nondelivery, as far as the principle of liability is concerned, although the length of the delay may affect in certain cases the actual quantum of damages. The object of using the telegraph is its capacity for almost instantaneous transmission of intelligence, and if this purpose is defeated there is no consideration for the increased cost of its use. In every respect except that of time, the postal service, with its small cost and greater secrecy, would be preferable.

In the case at bar, it is admitted that the telegram was not promptly delivered, but the defendant insists that its nondelivery was not due to any negligence on its part, but solely to its failure to find the addressee, after every reasonable

effort to do so. It does not set up any contractual limitations of liability. In fact it appears that the plaintiff addressee lived within the free delivery limits of Gaffney. The usual printed terms of the company are not set out in the record, but they are on the back of all blanks of the defendant company, and can be found on page 436 of Croswell's Law of Electricity. The only difference appears to be that the author has omitted the words "any message" in line 27 of the form after the word "forward." The clause under consideration is as follows: "Messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance, a special charge will be made to cover the cost of such delivery." By its very terms this provision does not apply to the office from which the message is sent. It may be further noted that the company does not say that the message will not be delivered beyond such limits, but that "a special charge will be made to ³¹¹ cover the cost of such delivery," which would seem to clearly imply that it would be delivered. No fixed limit of distance nor definite sum is specified, and it is difficult to see how the sender can be presumed to know either in the absence of information from the company.

Many of these printed terms have been held void as contrary to public policy, but even where valid they must be reasonably construed: *Brown v. Postal Tel. Co.*, 111 N. C. 187, 32 Am. St. Rep. 793; *Sherrill v. Western Union Tel. Co.*, 116 N. C. 655; 117 N. C. 352; *Dowdy v. Western Union Tel. Co.*, 124 N. C. 522; *Landie v. Western Union Tel. Co.*, 124 N. C. 528.

The following comment by the court in *Western Union Tel. Co. v. Robinson*, 97 Tenn. 638, is peculiarly appropriate: "A rule merely made without notice to those who are to be affected by it, and without exaction of conformity to it, and which is not in fact observed by the company itself, cannot, as a protection against liability, be laid away in the secret consciousness of the agents of the company, unknown and unobserved, until the occasion arises to apply it, on account of liability incurred by failure to deliver."

In the case at bar this limitation of free delivery limits is invoked only to excuse the agent at the terminal office from not informing the agent at the office of transmittal that the message has not been or could not be delivered. This becomes purely a question of reasonable diligence, and we think is an-

answered by the fact that there was a telephone from the depot, where the office of the defendant appears to be, to the home of the sender. It would seem that ordinary care would require the agent at Lincolnton to step to the telephone and notify the sender that a message of such vital interest had not been delivered. This he doubtless would have done if he had been informed of that fact by the agent at Gaffney. We think that it is the duty of the company in all cases where it is practicable to do so to promptly inform the sender of a message that it cannot be delivered. While its failure to do so may not be negligence per se, it is clearly evidence of negligence. In many instances, by such a course, the damage could be greatly lessened, if not entirely avoided. A better address might be given, mutual friends might be communicated with, or even a letter might reach the addressee. In any event, the sender might be relieved from great anxiety, and would know what to expect. Moreover, it would tend to show diligence on the part of the company.

The question as to what would have been the legal effect if the message had been left with the company in whose care it was addressed does not arise. The messenger testifies that he went into the office of the Gaffney Cotton Mills and asked Wardlaw if Hendricks was there, and was told to go and look. He did not show the message to Wardlaw or anyone else at the mill, nor did he inform them that it was directed in their care. In spite of a hypothetical answer of the witness Wardlaw, we cannot suppose that if he had been informed of the nature of the telegram addressed to one of his employes in his care, he would not have taken some little trouble to have aided in its delivery. The messenger merely asked the postmaster if he knew the plaintiff, but did not ask him if the plaintiff received his mail at that office. These facts, so far from exonerating the defendant, tend to prove its negligence, but as there was some conflicting testimony, as well as other material facts, the matter was properly submitted to the jury, who in all cases have the constitutional right to pass upon the weight and credibility of the testimony. What is due diligence or reasonable care, the phrases in this case being practically synonymous, are nearly always, if not always, mixed questions of law and fact. Difficult of accurate definition and still more so of determination, they depend upon the relative facts of each case and come peculiarly within the

province of the jury. Frequently, the question of negligence depends not so much on any one fact as on a combination of facts, and therefore the singling out of any one fact which directly or inferentially is made the turning point in the case might of itself be error.

There does not appear to have been made any effort to deliver the second telegram. As we see no error in the trial of the case the judgment below is affirmed.

TELEGRAPH COMPANIES.—PROMPT DELIVERY of a telegram is of the essence of the contract: *Western Union Tel. Co. v. Adams*, 75 Tex. 531, 16 Am. St. Rep. 920. On the duty and liability of telegraph companies respecting the delivery of messages, see the monographic notes to *Western Union Tel. Co. v. Houghton*, 27 Am. St. Rep. 923-925; *Western Union Tel. Co. v. Cooper*, 10 Am. St. Rep. 779-790.

TELEGRAPH COMPANIES.—NOTICE OF RULES.—The sender of a telegraphic message is not bound by the rules and regulations of the company of which he has no notice: *Carland v. Western Union Tel. Co.*, 118 Mich. 369, 74 Am. St. Rep. 394.

TELEGRAPH COMPANIES.—DILIGENCE OF, in the delivery of a message, whether a question of law or fact, is discussed in the note to *Western Union Tel. Co. v. Houghton*, 27 Am. St. Rep. 925.

TELEGRAM, NONDELIVERY OF.—NOTICE TO SENDER.—It is the duty of a telegraph company, in all cases when it is practicable to do so, promptly to inform the sender of a message that it cannot be delivered. A failure to do so is evidence of negligence, though it may not be negligence per se: *Laudie v. Western Union Tel. Co.*, 126 N. C. 431, post. p. 668.

TELEGRAM—FAILURE TO DELIVER.—A PRIMA FACIE case is made out against a telegraph company when it is shown that a message which it undertook to send was not delivered, and that damage has resulted: *Fowler v. Western Union Tel. Co.*, 80 Me. 381, 6 Am. St. Rep. 211. Compare *United States Tel. Co. v. Gilderaleve*, 29 Md. 232, 96 Am. Dec. 519.

WINKLER v. CAROLINA AND NORTH WESTERN RAILWAY COMPANY.

[128 North Carolina, 370.]

BARBED-WIRE FENCE—NEGLIGENTLY MAINTAINED—NUISANCE.—A railroad company, which maintains a barbed-wire fence along its right of way in such a negligent condition that it is dangerous to stock, is liable to the owner of stock injured by it, since by its location and the probability of causing injury at that place in its defective state the fence is a nuisance.

E. B. Cline and M. H. Yount, for the appellant.

J. H. Marion and T. M. Huffham, for the appellee.

⁸⁷¹ CLARK, J. The defendant erected a barbed-wire fence along its right of way. There was evidence that it was negligently erected and maintained. "In some places it was twelve inches high and from that to thirty or thirty-five inches from the ground to the top wire. Three strands of wire were used, and it was put so far apart that, when people crossed it, it sagged down about twelve inches in some places. The posts were old, rotten cross-ties, forty or fifty feet apart." The plaintiff's horse, running in his pasture, got entangled in this ⁸⁷² wire fence, and was injured, and this action is brought for damages sustained. It was error in the judge to nonsuit the plaintiff.

In *Siak v. Crump*, 112 Ind. 504, 2 Am. St. Rep. 213, it is said: "The act of a land owner in erecting upon his property along a public highway a barbed-wire fence does not in itself render him liable to one who sustains an injury therefrom, but if he negligently constructs and maintains it in such a manner as to be dangerous, he is liable, for instance, for injury to an animal which is attracted by other animals, or by grass growing inside the fence, and in endeavoring to cross such defective fence becomes entangled therein." The court says the statute of that state expressly authorizes the erection of barbed-wire fences, and the liability comes only from their neglected condition. To exactly the same purport is *Loveland v. Gardner*, 79 Cal. 317, that while the owner of land is not liable from the mere act of constructing a wire fence thereon, for damages sustained by the animals of others, yet he is bound to see that the fence is not so negligently maintained as to become a trap for them from their natural propensities, of which he must take notice. The liability of the defendant in this case is that which would attach to anyone else putting up a defective fence which is from its peculiar nature thereby made dangerous.

Chapter 65 of the Laws of 1895 makes it unlawful to erect a barbed-wire fence along any public road or highway, unless a railing is placed on top of the fence not less than three inches high. It is, perhaps, to be regretted that this act is restricted to the counties therein named. But though Catawba (whence this appeal comes) is one of such counties, we think the act has no application here, for the railroad, though a public highway in some senses, is not such within ⁸⁷³ the purview of this

act, which was evidently intended for the protection of livestock passing along a public road.

Nor does it make any difference that Catawba county is within the limits of the "no-fence territory" in which stock are prohibited from running at large. Not only the track of the defendant passed through the plaintiff's pasture where his stock had a right to run unless the defendant fenced up its right of way (*Raleigh etc. R. R. Co. v. Sturgeon*, 120 N. C. 225), but even if it were otherwise, and the plaintiff's horse was illegally running at large, it was not contributory negligence: *Horner v. Williams*, 100 N. C. 230. Nor could contributory negligence be considered on a motion to nonsuit: *Cogdell v. Wilmington etc. R. R. Co.*, 124 N. C. 302. The plaintiff was liable for the trespasses if the animal was illegally at large, and the horse could be impounded, but the defendant had no right to catch him in a barbed-wire trap, and wind him up in its meshes as merciless as the coils which crushed Laocoon and his sons. The defendant was not compelled to put up a fence at all (*Jones v. Western etc. R. R. Co.*, 95 N. C. 328), but if it did so, it should not be put up in a negligent manner calculated to injure livestock. *Sic utere tuo, ut alienum non laedas*. It is not claimed that the defendant did so intentionally. The ground for damages is the defendant's negligence in maintaining a barbed-wire fence in such a negligent condition that the horse, running in his owner's pasture, was caught and cut by an impediment which, in view of the nature of the animal, enticed him to try to cross it, instead of being high enough and tight enough to hold him back. In *Jones v. Western etc. R. R. Co.*, 95 N. C. 328, in which the defendant company was held not liable for the plaintiff's blind horse falling into the cut, there was no allegation that the cut, which was necessary, was negligently excavated, and that thereby the injury was caused. ⁸⁷⁴ Here, the negligent method of keeping up the fence is alleged as the direct cause.

This case differs from *Morrison v. Cornelius*, 63 N. C. 346, where the owner of saltpeter vats covered them up, and inclosed them by a sufficient fence, but the plaintiff's cattle got into the inclosure in some unknown way, drank of the liquid, and died. It was held there was no evidence of negligence. It was also held that if one digs a well or a trench on his own land, and a neighbor's cattle fall therein, the land owner is not liable. So situated, they are not nuisances per se, or likely to

injure. But here the wire fence is dangerous by the manner in which it is put up; it was likely to injure, for it was on the edge of a neighbor's pasture where his livestock would be likely to come and, if they came, would almost certainly be ensnared. By its location and the probability of its causing injury at that place in its defective state, it was a nuisance: *Shearman and Redfield on Negligence*, 5th ed., sec. 702, and cases cited; *Rehler v. Western etc. R. R. Co.*, 8 N. Y. Supp. 286; 55 Hun. 604, and cases cited.

New trial.

DEFECTIVE FENCES.—A RAILROAD company neglecting to keep a barbed-wire fence in repair, as required by statute, is liable to the owner of adjoining lands for injury caused by such fence to his horses which he has turned out in the highway to graze: *Siglin v. Coos Bay Co.*, 35 Or. 79, 76 Am. St. Rep. 463.

SNIPES v. WINSTON.

[126 North Carolina, 374.]

MUNICIPAL CORPORATIONS—CONTRACTS OF, WITH THEIR OWN OFFICERS.—The election by a city board of aldermen of one of its own members to be "street boss," at a stated compensation, such member participating in the meeting at which he was elected, is against public policy, and the contract for services is void and unenforceable.

J. S. Grogan, for the appellant.

Glenn & Manly, for the appellee.

375 FAIRCLOTH, C. J. The board of aldermen of the city of Winston on March 1, 1898, elected the plaintiff a "street boss," and contracted to pay him fifty dollars per month for six months. His duties were to superintend, construct, and repair the streets, and to keep in order the sewerage system of the city. At the time of said election and contract, the plaintiff was a member of the board of aldermen, and participated in the meeting at which he was elected.

A new board was elected and inducted into office on May 1, 1898, when the plaintiff was discharged and paid for the services then rendered. He now sues for the balance specified in the contract for the next succeeding four months. His

honor held, upon these facts, that the plaintiff could not recover, and rendered judgment for the defendant.

The board of aldermen, of which the plaintiff was a member, was the agent of the city, and its duty was absolute loyalty to the best interests of its principal. The plaintiff was interested in obtaining the best possible contract from himself and his associates on the board. There was then antagonism between his duty to the city and his personal individual interest in making said contract.

It is against public policy to permit such contracts to be enforced. It would be unsafe for the plaintiff, acting as employer, to become himself by the same bargain, an employé. *Smith v. Albany*, 61 N. Y. 444, is a case in point. The plaintiff, being a member of the common council, contracted with the board to furnish horses and carriages for the procession celebrating July 4th, which the council had in charge. It was held that he could not recover. Story on Agency well states the principle: "It may be correctly said with reference to Christian morals that no man can faithfully serve two masters whose interests are in conflict. If, then, the seller were permitted as the agent of another to become the purchaser, his duty to his principal and his own interest would stand in direct opposition to each other; and thus a temptation, perhaps in many cases too strong for resistance by men of feeble morals or hackneyed in the common devices of worldly business, would be held out which would betray them into gross misconduct, and even into crime. It is to interpose a preventive check against such temptations and seductions that a positive prohibition has been found to be the soundest policy, encouraged by the purest principles of Christianity. This doctrine is well settled at law. And it is by no means necessary in cases of this sort that the agent should make any advantage by the bargain. Whether he has or not, the bargain is without any obligation to bind the principal."

This principle cannot be questioned, and experience has shown its wisdom. Common reasoning declares this principle to be sound, and the public is entitled to have it strictly enforced against every public official.

In obedience to this reasoning and upon these authorities we hold that the contract under consideration is void and unenforceable. It, therefore, becomes unnecessary to consider any other question presented in the record.

Affirmed.

OFFICERS CANNOT BE INTERESTED IN CONTRACTS pertaining to their office: *Land etc. Co. v. McIntyre*, 100 Wis. 245, 69 Am. St. Rep. 915. A contract to build a schoolhouse, let to the director of the district by a board of which he is a member, is void as against public policy: *Pickett v. School Dist.*, 25 Wis. 551, 3 Am. Rep. 105. See, further, *Goodyear v. Brown*, 155 Pa. St. 514, 35 Am. St. Rep. 908; *Berka v. Woodward*, 125 Cal. 119, 73 Am. St. Rep. 81.

LAUDIE v. WESTERN UNION TELEGRAPH COMPANY.

[126 North Carolina, 431.]

TELEGRAPH COMPANIES—LIABILITY FOR FALSE ASSURANCE OF DELIVERY OF MESSAGE.—Even if a telegraph company is not guilty of negligence in failing to deliver a telegram, this does not relieve it from liability for its negligent assurance that it had been delivered.

TRIAL—FACTS FOUND BY JURY—PRESUMPTION.—Where issues of fact or questions of mixed law and fact are properly submitted, and there is conflicting evidence sufficient to go to the jury, the court will assume as proved all facts found by their verdict either directly or by necessary implication.

TELEGRAPH COMPANIES—FALSE ASSURANCE OF DELIVERY OF MESSAGE.—The assurance of a telegraph company, false in fact, though not in intention, that a telegram had been delivered, is actionable negligence, and the injured party can recover such damages as directly result therefrom.

TELEGRAPH COMPANIES—DUTY—DELIVERY OF MESSAGE.—It is the duty of a telegraph company, in all cases when it is practicable to do so, to promptly inform the sender of a message that it cannot be delivered; a failure to do so is evidence of negligence, though it may not be negligence per se.

Civil action for damages for mental anguish occasioned the feme plaintiff by the alleged negligent and untrue assurance that a telegram had been delivered. Plaintiffs lost by death a young child, whom they desired to bury at Chesterfield, South Carolina. They sent the following telegram to a relative: "Frank dead. Meet depot at Wadesboro, 8 A. M.; bury him in Chesterfield. Grave 3 feet." The feme plaintiff left for Wadesboro with the body and three children.

Jones & Tillett, for the appellant.

Osborn, Maxwell & Keerans, for the appellee.

⁴³³ DOUGLAS, J. This case was here before, being reported in 124 N. C. 528, being erroneously printed "Landie." Nearly all the material facts were then set out and need not be

fully repeated. In the case as now before us it appears that the telegraph wires did not go beyond Cheraw, but that from Cheraw to Chesterfield there was a telephone wire which was ⁴³⁴ used for the transmission of telegrams. The defendant included in its charges, which were prepaid by the husband of the plaintiff, the extra amount usually charged by the telephone company. This evidence is material only as tending to show that the defendant undertook to transmit the message to Chesterfield by telephone. It appears that at that time the telephone wire was down, and that therefore the telegram could not be forwarded. It is conceded that the defendant was not guilty of negligence in failing to deliver the telegram to the addressee, but that does not relieve it from liability for its negligent assurance that it had been delivered. It is true the defendant introduced evidence in contradiction, but where there is conflicting evidence sufficient to go to the jury, they alone can pass upon its credibility, and we must assume as proved all facts found by their verdict either directly or by necessary implication. This rule applies only to issues of fact properly submitted, or to questions of mixed law and fact in the absence of legal error in the trial. The plaintiff testifies that she confidently relied upon her kinsman Huntley meeting her, and that if she had not been assured that the telegram had been delivered, she would have taken her husband with her; and that she suffered great mental anguish in finding herself at Wadesboro practically alone and friendless with three helpless children and the dead body of another. She says the railroad agent, Biggs, was kind to her; but she was much delayed, and suffered greatly, not only from her disappointment, but also from being compelled to travel eighteen miles through the country with no one but the driver. This testimony was clearly competent, and was certainly more than a scintilla. What she suffered, or whether she suffered at all, is not for us to say. The jury who heard the testimony in its entirety and had every opportunity to observe the demeanor of the witnesses, have said ⁴³⁵ she did. To them alone belongs by constitutional provision the determination of the facts, and in the absence of any error in the conduct of the trial we cannot disturb their verdict. His honor properly confined them to the consideration of such damage only as directly resulted from the negligent assurance that the telegram had been delivered. He cautioned them with clearness and precision not to allow any

damages on account of the failure to deliver the telegram, or of the consequences solely resulting therefrom; and to distinguish between the mental anguish caused by the negligence of the defendant from the sorrow that would naturally be felt by a mother for the death of her child. While the circumstances of her bereavement must be taken into consideration in determining the question of her anguish, her damages must be measured only by the additional pain caused by the negligence of the defendant. This may be great or little under different circumstances. A degree of exposure which would merely stimulate the blood of vigorous manhood might be fatal to one weakened by age or enfeebled by disease. So, a disappointment, slight and transient under ordinary circumstances, might sorely wound a heart whose bleeding strings were yet quivering with the agony of bereavement.

We think that the assurance of the defendant, false in fact, if not intention, was actionable negligence, and that the plaintiff can recover such damages as directly resulted therefrom. While this point was neither argued nor directly decided when this case was here before, it was inferentially determined. It was embraced in the first cause of action, and on page 532 we say: "Even if the male plaintiff had not notified the defendant of the urgency of the message, its importance clearly appeared upon its face; and the negligence of the defendant in failing to deliver it was aggravated by its negligent assurance that it had been delivered." On that ⁴³⁶ trial the defendant relied upon its want of legal liability, and introduced no evidence. As the failure to promptly deliver a telegram is prima facie evidence of negligence, we were then compelled to treat the case in that view—coming before us as it did upon a demurrer to the evidence. The main questions then discussed were those decided in *Cashion v. Western Union Tel. Co.*, 124 N. C. 459.

In *Hendricks v. Western Union Tel. Co.*, 126 N. C. 304, ante, p. 658, at this term, we say: "We think that it is the duty of the company in all cases, when it is practicable to do so, to promptly inform the sender of a message that it cannot be delivered. While its failure to do so may not be negligence per se, it is clearly evidence of negligence. In many instances by such a course the damage could be greatly lessened, if not entirely avoided. A better address might be given, mutual friends might be communicated with, or even a letter might reach the addressee. In any event, the sender might be re-

lieved from great anxiety and would know what to expect. Moreover, it would tend to show diligence on the part of the company."

We see no error in the admission or exclusion of testimony, and we think the complaint sufficiently sets out the cause of action. We do not see the irreconcilable contradictions in the charge of his honor so strenuously urged by the counsel for the defendant. We understand his honor to charge substantially that while the plaintiff cannot recover for the failure of Huntley or anyone else to meet her as resulting from the failure to deliver the telegram, she can recover for such mental anguish as directly resulted from her placing herself unwittingly in circumstances of peculiar embarrassment in strict reliance upon the false assurance of the defendant, and in consequence thereof. The judgment is affirmed.

TELEGRAM, NONDELIVERY OF—NOTICE TO SENDER.—It is the duty of a telegraph company, in all cases in which it is practicable to do so, promptly to inform the sender of a message that it cannot be delivered. A failure to do so is evidence of negligence, though it may not be negligence per se: *Hendricks v. Western Union Tel. Co.*, 126 N. C. 304, ante, p. 658.

FLEMING v. BARDEN.

[126 North Carolina, 450.]

CONTRACTS—USURY—EXTENSION OF TIME.—The usurious payment of interest is a good consideration to support a contract to extend the time of payment of a debt secured by a mortgage.

MORTGAGES—DISCHARGE BY EXTENDING TIME OF PAYMENT OF DEBT.—Where a mortgage is executed for a debt of the husband by the husband and his wife, and a trustee who holds the land for the wife's benefit, an agreement between the mortgagee and the debtor to extend the time of payment of the debt has the effect to discharge the mortgage by operation of law, notwithstanding the fact that the wife was dead at the time the agreement was made.

TRUSTS—TRUSTEE BARRED, WHEN BENEFICIARIES NOT.—The doctrine that where the trustee is barred the beneficiary is also barred does not apply where the trustee, who has a bare, legal title, conveys such title to another, in accordance with a provision of the trust, and at his death there was nothing to descend to his heirs.

MORTGAGES—DISCHARGE OF SECURITY—INVALID SALE BY MORTGAGEE.—Where land, mortgaged as security for a debt, is discharged from the payment of such debt by reason of the extension of time of payment, the mortgagee has no right to

sell under the mortgage, and a purchaser at such a sale acquires no greater right than he would at a sale by a mortgagee after the debt was paid; and this right, though accompanied by possession, cannot ripen into a good title as against parties who are under the disability of infancy and coverture.

Civil action for the possession of land. The facts are stated in the opinion, except that after the death of the trustee, Congleton, R. T. Hodges was appointed in his place, but he had no knowledge of his appointment.

A. O. Gaylord, for the appellant.

W. B. Rodman, for the appellee.

⁴⁵² FURCHES, J. This is an action for the possession of land, in which the defendant denies title in the plaintiffs, alleges title in herself by mesne conveyances from plaintiffs' ancestors, and also by color of title ripened by adverse possession, and the statute of limitations. The facts presented are as follows: That in June, 1880, John L. Brown and wife, M. L. Brown, conveyed the land in controversy to Ashley Congleton, in trust for M. L. Brown for life, then for the issue of John L. and M. L. Brown; and if the said M. L. Brown should die without leaving issue, then for the said John L. Brown. But this deed expressly provided that the said John L. Brown and M. L. Brown shall have full power and authority, by and with the consent of each other, to convey the same at any time, "and said trustee shall join in the said conveyance, whether the same be in fee simple or otherwise"; that on the ninth day of February, 1881, the said John L. borrowed five hundred dollars from J. B. Stickney, giving his bond due three years after date at eight per cent, payable annually, and secured the same by a mortgage on this land, executed by John L. and M. L. Brown and the trustee, Congleton. This mortgage was in the usual form, conveying the fee simple, with the condition ⁴⁵³ that it should become void upon the payment of said bond. On the 3d of March, 1882, the trustee, Congleton, died, leaving three minor children, two of whom were minors at the commencement of this action; the other had been of age for three years and five months when the action was commenced. In August, 1884, the said M. L. Brown died, leaving surviving her her husband, John L., and the plaintiffs Mollie L. Fleming, Dora L., John L., and Lena M. Brown—the last three named being minors under twenty-one years of age, except Mrs.

Fleming, who was under coverture when this action was commenced, and is still.

The plaintiffs allege that this was their mother's land; that the debt was that of their father, and that the mortgage was only a security for the debt. And they further allege that the security, the mortgage lien on the land, was discharged by a contract made and entered into by Stickney, the mortgagee, and John L. Brown, the principal debtor, for an extension of time on the debt so secured by the mortgage; that this agreement was in the fall of 1884 to extend for one year for fifty dollars; that in January, 1888, Stickney sold under the mortgage when Arthur Barden bought and took deed to W. C. Ayers, who on March 3, 1888, conveyed the same to the defendant Maggie Barden, and that she had been in possession of the same ever since the date of her deed in March, 1888.

Upon the admitted facts and the evidence in the case, the court submitted the following issues:

"1. Did Stickney agree with John L. Brown to extend time of payment of the mortgage debt from February 9, 1885, to February 9, 1886, in consideration of the payment by Brown of ten per cent interest on the debt for the year ending February 9, 1885, to wit, fifty dollars? Answer. Yes.

"2. Was said consideration paid by Brown, and if so, when? Answer. Yes, April, 1885.

454 "3. Did R. T. Hodges have knowledge of his alleged appointment as trustee in the proceeding entitled John L. Brown and others ex parte? Answer. No.

"4. Are the plaintiffs the owners of and entitled to recover possession of the land described in the complaint? Answer. Yes.

"5. What is the rental value of the land for the period beginning July 4, 1894, up to the present time? Answer. Three hundred dollars."

Thereupon the court rendered judgment that the plaintiffs are the owners of and entitled to the possession of the land, etc.

Upon the close of the evidence, the defendant moved to nonsuit the plaintiffs for the reason that the evidence, all taken to be true, did not make out a case for the plaintiffs. This was refused, and we see no error in its refusal. It seems to us that it could hardly be disputed but what there was evidence tending to prove all the facts alleged by the plain-

tiffs, and sufficient to authorize the jury to find the issues submitted to them as they did.

But taking the issues as found and the facts as admitted, the case presents some very interesting questions of law, upon the solution of which the rights of the parties depend.

The evidence, with regard to the contract and consideration for the extension of time, was that the mortgagee, Stickney, proposed to Brown, the principal debtor, that if Brown would pay him fifty dollars interest instead of forty dollars, he would extend the time twelve months. This offer was accepted by Brown, and the money paid to Stickney's attorney or agent. The defendant asked the court to charge the jury that this did not constitute a contract to extend the time of payment, first, for the reason that the plaintiffs did not receive the money. But the court held that if the agent received it under the contract ⁴⁵⁵ and agreement of Stickney with Brown, this was the same as if Stickney had received it himself. And we think this must be so.

The defendant further contended that if he did receive it, that it was usurious interest; that a contract to extend time must be upon a good consideration; that the usurious payment of interest was not a good consideration, and did not support the contract, and cited *Bank v. Lineberger*, 83 N. C. 454, 35 Am. Rep. 582, as authority for this contention; and it is so held in that case. But in *Carter v. Duncan*, 84 N. C. 676 (the next term after the case of *Bank v. Lineberger*, 83 N. C. 454, 35 Am. Rep. 582, had been decided), the case of *Bank v. Lineberger*, 83 N. C. 454, 35 Am. Rep. 582, was overruled; and *Carter v. Duncan*, 84 N. C. 676, has been held to be the law ever since, and has been cited with approval in several cases, among them *Forbis v. Shepard*, 98 N. C. 111; *Hollingsworth v. Tomlinson*, 108 N. C. 245. And as was said in *Bank v. Sumner*, 119 N. C. 591, we think this doctrine has been carried far enough. But it seems to us that these cases ought to be considered as settling the doctrine in this state, and the court below properly refused to give this instruction. This covers the defendant's prayers down to the fifth.

The fifth prayer asks the court to instruct the jury that, as Mrs. Brown was dead when this agreement for extension of time was made, it did not have the effect to discharge the mortgage, as it was not shown that she had an administrator, or that her children had a guardian, and there was no one to

pay the debt. The court refused this prayer and the defendant excepted. We cannot sustain the exception. The discharge is by operation of law, and we cannot say that it shall apply in some cases and not in others. We have not been furnished with any authority for making such exception.

The sixth prayer is that the original trustee, Congleton, was dead, and that his interest descended to his heirs at law; ⁴⁵⁶ that one of them had been above the age of twenty-one for more than three years when this action was commenced; that where the trustee is barred, the cestui que trust is also barred; and that, as one of the trustees was barred, they were all barred, and the plaintiffs, though infants and femmes covert, were also barred. This is a correct proposition of law, as applied to some trusts. But taking the view of the case we do, it is not necessary for us to decide this question.

The deed of trust to Congleton expressly authorizes John L. and M. L. Brown to convey in fee simple, or any less estate, and that it shall be the duty of the trustee, Congleton, to join them in making such deed. They exercised this power in making this mortgage to Stickney, and the trustee, Congleton, joined them in making it. Congleton never had anything but the bare legal title to the land, and when this mortgage was made, which is a deed in fee simple with other trusts attached, all the estate he ever had in the land passed out of him into Stickney.

Congleton died before it is alleged that there was any discharge of the land from this debt on account of extension of time. And when he died, he had no estate to descend to his heirs. It is true that if Congleton had been the equitable owner as well as the legal owner, the equitable right of redemption would have descended to his heirs. But the only thing their father ever had was the naked legal title, and this was gone. He had nothing to descend to his heirs, and they had no interest to redeem. And, indeed, it does not seem to be claimed that they should have done so. But the defendants claim that the naked legal title was in them, and, as they did not bring suit for the possession of the land, the statute is a bar to plaintiff's right to recover. But as it is seen that they had no legal title to the land, and we think no ⁴⁵⁷ equitable estate, the doctrine contended for by defendants does not apply.

For the purposes of this case, it is not necessary for us to decide where the legal title was, after the discharge of the land from the debt, so that it was not in the heirs of Congleton. It may be that when the mortgage deed was made to Stickney the trust was thereby terminated, and that Mrs. Brown became the absolute owner subject to the mortgage encumbrance. And if this was not so, it would seem that the legal estate was in the defendant; and, if so, she held the naked legal title in trust for the plaintiffs, and the statute could not run in her favor; and if both the legal and equitable estate was in the plaintiffs, the statute, or presumption, on account of possession, did not run against them on account of their infancy and coverture.

The land being discharged from the payment of the debt by reason of the extension of time, the mortgagee had no right to sell under the mortgage, unless it was the naked legal title, and the purchaser at the sale got nothing more. It is like selling after the debt had been paid: *Jenkins v. Daniel*, 125 N. C. 161, 74 Am. St. Rep. 632. It is true that John L. Brown seems to have been at the sale, made no objection to it, and did not then let it be known that he had obtained an extension of time. And if it had been his land, it would seem that this would be an estoppel in pais. But it was no estoppel as against the plaintiffs who are infants and femmes covert. It may be a hardship on the defendant, if she was an innocent purchaser without notice (which, if so, is not presented by this appeal), but such is said to be "the quicksands of the law." The judgment is affirmed.

MORTGAGE.—EXTENDING THE TIME OF PAYMENT does not destroy the lien of a mortgage: Monographic note to *Dumell v. Terstegge*, 85 Am. Dec. 469. But see *Nelson v. Brown*, 140 Mo. 580, 62 Am. St. Rep. 755; extended note to *Klapworth v. Dressler*, 78 Am. Dec. 75.

ON USURY AND USURIOUS CONTRACTS, see the monographic note to *Davis v. Garr*, 55 Am. Dec. 391-400. Payment of a usurious debt by a sale of land does not render the sale void for usury: See the monographic note to *Sylvester v. Swan*, 81 Am. Dec. 737.

BROWN v. LOUISBURG.

[126 North Carolina, 701.]

TO MAKE PERSONS JOINT TORT FEASORS they must actively participate in the act which causes the injury.

NEGLIGENCE—EXCAVATION IN SIDEWALK—LIABILITY OF TOWN AND PROPERTY OWNER.—Where a property owner makes an excavation in the sidewalk, which was known to the authorities of the town, and the excavation is negligently left unguarded, so that a person, without fault of his own, falls into it and is badly hurt, such person may sue the party making the excavation and also the town for permitting the sidewalk to remain in a dangerous condition.

RELEASE—EFFECT OF, ON PARTY SECONDARILY LIABLE FOR TORT.—A full release and discharge, for a valuable consideration, of a party primarily liable for a tort injury operates as a release of the party secondarily liable, especially where the latter is entitled to recover from the former whatever damages he might be compelled to pay to the injured party.

C. M. Cooke & Son, W. H. Yarborough, Jr., and W. M. Person, for the appellant.

F. S. Spruill and W. H. Ruffin, for the appellee.

702 MONTGOMERY, J. This action was brought against the defendants to recover damages for personal injuries sustained by the plaintiff on account of the alleged negligence of the defendant. The defendant Ponton, in building a store within the limits of the town of Louisburg, made a deep excavation abutting upon the sidewalk, and after the front wall of the building had been built up to the level of the sidewalk there was still left a part of the excavation between the front wall and the center of the sidewalk, extending into the sidewalk about two feet. The hole was about two feet in width at the top, but slanting and narrow at the bottom. The town authorities had knowledge of the excavation in the sidewalk.

On a dark night the plaintiff, without fault of his own, fell into this excavation and was badly hurt. The hole was unguarded by rail or otherwise and no danger signal was displayed.

While the action was pending the plaintiff agreed in writing, through his attorneys, for the consideration of seventy-five dollars, "to enter a nonsuit . . . and to release J. W. Ponton from any and all claims of the plaintiff against J. W. Ponton, by reason of the facts set forth in the complaint filed in the above cause, and from any and all claims of every description

which the said Shelly Brown may have against the said J. W. Ponton." It was verbally agreed at the time of the execution of the agreement that the payment of the seventy-five dollars was not made or accepted in full satisfaction of the injuries sustained, but simply to discharge Ponton.

The contention of the plaintiff's counsel is that the defendants are not joint tort feorsors, but that they were "cotrespassers, codelinquents, cowrongdoers," and that their liability to the plaintiff is not only joint, but several; and that therefore the effect of the contract between the plaintiff and Ponton and the payment of the seventy-five dollars was only a payment ⁷⁰³ pro tanto which inures to the benefit of the other defendant, the town of Louisburg. It seems to us immaterial, in considering the effect of the contract between the plaintiff and Ponton, whether the defendants were joint tort feorsors or codelinquents in the sense in which that word is used by the plaintiff's counsel.

The defendants were not, however, joint tort feorsors. To make persons joint tort feorsors they must actively participate in the act which causes the injury. The town of Louisburg had no active part in the matter of building the house or in creating the nuisance. The authorities of the town knew, or ought to have known, of the excavation in the street; but Ponton did not act under the directions of the corporation, nor were his acts in any way for its benefit. The absence of objection on the part of the town authorities to the defendant Ponton's digging the excavation cannot be considered a presumption that the town intended to authorize Ponton to leave the excavation unguarded. Ponton, therefore, was the active wrongdoer in digging a pit on the public street and leaving it unguarded. The town's liability arose out of its negligently permitting its sidewalk at that dangerous place to remain unguarded.

The real question in the case is this: Upon which of the defendants is the ultimate liability resting as between themselves? The plaintiff can, of course, sue either one, but which one of the defendants is liable to the other for the damages which the plaintiff would be entitled to recover for the injury which he has sustained on account of their negligence? We think that Ponton would be liable to the town, and that any recovery which might be made against the town could be

ultimately recovered back from Ponton: *Robbins v. Chicago*, 4 Wall. 657.

And again, the plaintiff and the defendant had a legal right to make the contract which they entered into, and the consideration having been paid by Ponton, he must be protected in his right under that contract. He cannot be protected in those rights if the town is, by law, permitted to recover out of him whatever damages the town might be compelled to pay the plaintiff. And the town, as we have seen, can bring such an action against Ponton and recover from him the amount which it, by process of law, had been made to pay on account of his negligence.

Such a result would be the complete destruction of Ponton's rights under his contract with the plaintiff. His honor should have instructed the jury that upon the evidence the plaintiff could not recover.

New trial.

TO MAKE PERSONS JOINT TORT FEASORS, concert of action and common intent and purpose are generally necessary: *Valparaiso v. Moffitt*, 12 Ind. App. 250, 54 Am. St. Rep. 522; though all who aid, command, advise, or countenance the commission of a tort by another are liable in the same manner as when they do it with their own hands: *Moir v. Hopkins*, 16 Ill. 813, 63 Am. Dec. 312.

THE RELEASE OF ONE JOINT TORT FEASOR is the release of the others: See the monographic note to *Seither v. Philadelphia Traction Co.*, 11 Am. St. Rep. 906-909.

A CITY AND THE OWNER OF A BUILDING ARE BOTH LIABLE to one who falls into an excavation extending onto the sidewalk, with descending steps to a cellarway in the front of the building: See the monographic note to *Phillips v. Coffee*, 63 Am. Dec. 357.

PRICHARD v. BOARD OF COMMRS. OF MORGANTON.

[126 North Carolina, 908.]

COUNTIES—DEALING WITH SMALLPOX—BURNING HOUSE.—Under statutes conferring power to make regulations to prevent the spread of contagious and infectious diseases, and to destroy such furniture or other articles which shall be believed to be tainted or infected with such diseases, neither a town nor county has authority to burn a residence house to prevent the spread of such diseases. A proper disinfection would be the extent of their powers in respect to property thus tainted or infected.

COUNTIES AS MUNICIPAL CORPORATIONS—LIABILITY.—Counties are not, in a strict legal sense, municipal corporations, but are rather instrumentalities of government, with corporate powers to execute their purposes, and they are not liable in damages, in the absence of statutory provisions giving a right of action against them.

MUNICIPAL CORPORATIONS—WHEN LIABLE FOR AGENTS' ACTS.—Towns and cities are, as a general rule, liable for the negligent discharge, by their officers and agents, of specific duties imposed by law, or when such authorities are acting within the scope of their authority in the management of their property for their own interest, or in the exercise of powers voluntarily assumed for their own advantage, even though such work inures to the benefit of the municipality.

MUNICIPAL CORPORATIONS—WHEN NOT LIABLE.—In the absence of statute, a city or town incurs no liability for the negligence of its officers, where they are exercising the judicial, discretionary, or legislative authority conferred by its charter.

COUNTIES—LIABILITY FOR BURNING HOUSE.—A county is not liable to a plaintiff in tort for the burning of his house, in the absence of statute imposing such liability, either expressly or by necessary implication.

MUNICIPAL CORPORATIONS—LIABILITY FOR BURNING HOUSE.—A city or town is not liable to a plaintiff in tort for the burning of his house, where its officers were acting for the benefit of the state at large, and they unreasonably exceeded the powers conferred on them by law.

PLEADING—DEMURRER—MISJOINDER OF CAUSES OF ACTION.—A complaint is not demurrable on the ground of misjoinder of causes of action where they all grow out of the same transaction.

S. J. Ervin and Avery & Ervin, for the appellants.

J. T. Perkins, for the appellee.

*** **MONTGOMERY, J.** The plaintiff, Nancy Prichard, a tenant in dower, brought this action against the commissioners of the town of Morganton, the board of commissioners of Burke county, and R. T. Claywell and Robert Ross as their agents and servants, to recover of them damages for burning the house in which she lived, and certain personal property therein, as a nuisance, because of alleged smallpox taint and infection; for injury and damage to growing crops on the same, and for unlawfully and wrongfully depriving her of her liberty by seizing and carrying her to a pesthouse for smallpox patients, and keeping her there for weeks in restraint of her freedom, and contrary to her will. The persons entitled to the remainder interest in the real estate are the other plaintiffs in this action.

The commissioners of Morganton, for one cause of demurrer to the complaint, say that the complaint fails to allege

that the tortious acts complained of were within the scope of the powers conferred on said corporation by its charter, and that it appears on the face of the complaint that the acts complained of are not within the scope of the powers of the ⁹¹⁰ corporation, and, for another ground of demurrer, say that if the acts complained of had been done under the express direction of the town commissioners the conduct of the commissioners would have been ultra vires.

The board of commissioners of the county demurred to the complaint, and amongst the grounds assigned these two seem to be the chief: "1. That the acts alleged to have been done by these defendants and constituting the plaintiff's cause of action against these defendants are not within the scope of the corporate powers and duties conferred upon or delegated to these defendants by law; 2. That said acts are not alleged to have been done or performed under or in pursuance of any order, resolution, or direction of these defendants, and these defendants are in no way liable."

The defendant Claywell demurred, because the complaint alleged that he was merely acting as the agent of the other defendants, and that there was imputed to him as an individual no unlawful or wrongful act.

We have examined the charter of the town of Morganton (Private Laws 1885, c. 120), and find no authority given to the town commissioners to burn or destroy any house or residence. In section 37 the town commissioners are authorized to take such measures as they may deem effectual to prevent the entrance into the town or the spread therein of any contagious or infectious diseases; and under those powers they are permitted to cause to be destroyed or disinfected such furniture or other articles which shall be believed to be tainted or infected with any contagious or infectious diseases, or of which there shall be reasonable cause to apprehend will generate or propagate diseases, and may take all other reasonable steps to preserve the public health, and for this purpose may use any money in the treasury.

That statute certainly does not even purport to give to the ⁹¹¹ town commissioners the right to burn a house in which a family, infected or thought to be infected with a contagious disease, reside. The right of the commissioners to destroy the property, indeed, is not admitted by the plaintiffs, but it is intimated that they acted under the authority of the act of 1893,

chapter 214, section 22; but upon examination of that section it appears that reference is there made to the powers and duties of the superintendents of health of the several counties. No powers or rights are there given to the town commissioners or to the board of commissioners of the county. It is there provided that, in cases where the county superintendent of health declares that a nuisance exists on premises, it shall be removed or abated at the expense of the town, city, or county in which the offender lives, in case of his inability to remove it, with the proviso that the expense chargeable to the town, city, or county shall not exceed one hundred dollars.

In reference to the powers conferred by law upon boards of county commissioners, we find that by subsection 22 of section 707 of the code, they can establish public hospitals for their several counties in cases of necessity, and make rules, regulations, and by-laws for preventing the spread of contagious and infectious diseases and for taking care of those afflicted thereby, the same not being inconsistent with the laws of the state. By no reasonable construction of that subsection of the code can it be held that the boards of county commissioners can burn a residence house to prevent the spread of contagious and infectious diseases. A proper disinfection would be the extent of their powers in respect to property thus tainted or infected.

It is not alleged in the complaint that the acts complained of were ordered by the county superintendent of health; nor does the cause of action as stated in the complaint proceed upon the idea that property was destroyed by the defendants ⁹¹² under a method allowed by law, and that the plaintiff is entitled to compensation for its loss. The action is one purely in tort.

It is well settled in this state that counties, that is, the boards of county commissioners in their corporate capacity, are not ordinarily liable to actions of a civil nature for the manner in which they exercise or fail to exercise their corporate powers. They may be sued only in such cases and for such causes as may be provided for and allowed by the statute. Counties are not, in a strictly legal sense, municipal corporations like cities and towns; they are rather instrumentalities of government, and are given corporate powers to execute their purposes, and they are not liable for damages in the absence of statutory provisions giving a right of action against them:

White v. Commissioners, 90 N. C. 439, 47 Am. Rep. 534;
Manuel v. Commissioners, 98 N. C. 9.

There is, however, a distinction between the liability of a county for failure to discharge corporate duties and that of a town or city for such a failure. Towns and cities are, as a general rule, liable in damages for the negligence of their officers and agents when specific duties are imposed by their charters and special statutes, when the damages are caused by their failure to discharge such duties and to exercise the powers conferred to that end, or when the town authorities are acting within the scope of their authority in the management of their property for their own interest, or in the exercise of powers voluntarily assumed for their own advantage, and that, notwithstanding the work they are engaged in will inure to the benefit of the municipality. But it is said in *Moffitt v. Asheville*, 103 N. C. 237, 14 Am. St. Rep. 810: "Where a city or town is exercising the judicial, discretionary, or legislative authority conferred by its charter, or is discharging a duty imposed solely for the benefit of the public, it incurs no liability ⁹¹³ for the negligence of its officers, though acting under color of office, unless some statute expressly or by necessary implication subjects the corporation to pecuniary responsibility for such negligence."

But the plaintiff does not complain of a negligent act of either of the defendants. The alleged cause of action is a positive act in tort—the burning of a residence house as a sanitary measure. The board of commissioners of the county, as representing officially the county, are not liable to the demand of the plaintiff, for the reason that there is no statute in existence which makes them so, either expressly or by necessary implication. The town commissioners, as representing the town community, are not liable, for the reason, first, that the act complained of was for the interest of the state at large, and because they unreasonably exceeded the powers conferred on them by the charter of Morganton or by any special statute in aid thereof.

The case is before us on demurrer, and of course the facts concerning the burning are to be taken as true for the purposes of the demurrer. If, however, it be a fact that the house in which the plaintiff lived was burned as alleged in the complaint, it was a most high-handed and unreasonable

act on the part of those who did it, and was done without the semblance of authority.

But she is not without redress. Her remedy will doubtless suggest itself to her counsel. The propositions of law which we have laid down seem to be admitted in the plaintiff's brief, and a recovery is sought upon the effect of the defendant's demurrer to the complaint. In the sixth allegation of the complaint it is alleged that the board of town commissioners burned the house under some statute or provision of law, which they claimed authorized them to assess and ^{\$}14 burn and pay for the damage an amount not exceeding one hundred dollars. Only the facts are admitted by the demurrer.

Parties to an action cannot by complaint and demurrer enact a law. There is no such statute as the one referred to in the complaint, and the defendant's demurrer cannot have the effect to admit that there is such a statute and law in force.

If the complaint be treated as containing only one cause of action, the demurrers ought to have been sustained, for the demurrers were directed against the whole complaint; though there was only one allegation that was demurrable—the one which charged that the residence house of the plaintiff was burned: *Cowand v. Meyers*, 99 N. C. 198. If the complaint be treated as embracing more than one cause of action, as we will treat it—all growing out of the same matter and therefore not demurrable on that account—we think that the demurrers were good against that cause of action which set forth the burning of the plaintiff's house and damages therefor. The other causes of action were not demurrable, and the demurrers should have been overruled as to them.

There was error in the particular we have pointed out.
Modified and affirmed.

FURCHES, J., with whom concurred Faircloth, C. J., dissented, and held that the demurrer to the complaint was properly overruled by the trial court, except as to the county. The demurrer admits the facts stated in the complaint to be true, and the facts state a cause of action against either the county, the town, or their officers. The claim that the officers are not liable because they were only the agents of the county and town cannot protect them, unless their employers had the right to commit the trespass upon the plaintiff, and to destroy their property. "And while this is so—must be so—the other defendants claim that they had no right to order this trespass and destruction of property, and demand protection on that account. So it is manifest that both of these contentions cannot be

true, nor can both these defenses be good." As to the contention that the charter of the town of Morganton, which confers power to destroy furniture and other infected property, or of which there is reason to apprehend will generate disease, and power to take all other reasonable steps to preserve the public health, does not extend to the destruction of houses, the judge said: "I do not agree to this contention. If that were true, what becomes of damage for her clothing, the bedclothing, tableware, and other articles of household furniture destroyed? Has the plaintiff no remedy for this trespass and destruction of property? I cannot so hold." The judge said that the charter gave the town commissioners plenary power to deal with contagious diseases. The county was probably not liable, because there was no statute authorizing the county commissioners to destroy property in Morganton.

A COUNTY IS NOT A MUNICIPAL CORPORATION proper, but only a quasi corporation: *Jefferson County v. Grafton*, 74 Miss. 435, 60 Am. St. Rep. 516. And in the absence of a statute imposing liability, it is not answerable for injuries resulting from the negligence of its officers and agents: *Helgel v. Wichita County*, 84 Tex. 392, 31 Am. St. Rep. 63. See, too, *Packard v. Voltz*, 94 Iowa, 277, 58 Am. St. Rep. 396.

THE LIABILITY OF CITIES FOR THE ACTS OF THEIR OFFICERS and agents is considered at length in the note to *Godard v. Harpswell*, 30 Am. St. Rep. 376-412. In so far as health officers perform or seek to perform public or governmental functions, the city is not answerable for damages resulting: See the monographic note to *Hurst v. Warner*, 47 Am. St. Rep. 548, on quarantine regulations; *Webb v. Detroit Board of Health*, 116 Mich. 516, 72 Am. St. Rep. 541.

MUNICIPALITIES ARE NOT ANSWERABLE FOR DESTROYING PROPERTY to prevent eminent public injury: *Aitkin v. Wells River*, 70 Vt. 308, 67 Am. St. Rep. 672.

HINKLE v. SOUTHERN RAILWAY COMPANY.

[126 North Carolina, 932.]

CARRIERS OF LIVESTOCK—NEGLIGENCE—PROOF BY PLAINTIFF.—In an action to recover for injuries to cattle resulting from delay in transportation, the plaintiff's case is fully made out when he has shown that the cattle were received by the carrier, and not seasonably and safely delivered—that is, not delivered at all, or delivered in a damaged condition, and after an unreasonable delay.

CARRIERS—SPECIAL CONTRACT—BURDEN OF PROOF. If a carrier, to escape any part of its common-law liability, relies upon a special contract, the burden rests upon it to affirmatively prove such contract, and to bring the injury clearly within the terms of its exemption.

CONNECTING CARRIERS — LIABILITY—BURDEN OF PROOF.—Among connecting lines of common carriers, that one in whose hands goods are found damaged is presumed to have caused the damage, and the burden is upon it to rebut the presumption.

TRIAL—BURDEN OF PROOF.—Where a particular fact, necessary to be proved, rests peculiarly within the knowledge of a party, upon him rests the burden of proof.

CARRIERS — SPECIAL CONTRACT — EFFECT.—While a common carrier may limit its liability to a certain extent by special contract, it does not thereby change its character and become a private carrier for hire.

CARRIERS—SPECIAL CONTRACT—CONSTRUCTION.—A special contract, limiting the liability of a common carrier, being in derogation of common law, is strictly construed, and is never enforced unless shown to be reasonable.

CARRIERS OF LIVESTOCK—WRITTEN NOTICE OF CLAIM FOR DAMAGES.—A stipulation in a contract for the carriage of livestock that the shipper shall give written notice of any loss he may suffer or intention to demand compensation is not to relieve the carrier from just liability, but is to give it such notice that it can protect itself; hence where a shipper, upon receiving cattle in a damaged condition, signs a receipt under protest, this constitutes sufficient notice to the carrier that the shipper intends to enforce his rights.

Action to recover damages for injuries to a carload of cattle resulting from delay in transportation. Plaintiffs shipped a carload of cattle from Hickory, North Carolina, to Norfolk. They urged to have them shipped by a through freight, but the defendant refused, and delayed sending them, doing so at length by a slow local freight, so that the cattle were four days and three nights in reaching their destination, a distance of less than four hundred miles. The defendant had ample notice of the date of shipment. On account of the delay the cattle were injured and lost greatly in weight. Plaintiffs were compelled to feed them en route, and lost the Saturday market, when cattle bring a higher price than at any other time. The defendant offered in evidence a contract which provided that, in consideration of a reduced freight rate, the plaintiffs released the railroad company from all liability for "injury, loss, and damage or depreciation which the animal or animals, or either of them, may suffer in consequence of either of them being weak, or escaping, or injuring himself or themselves or each other, or in consequence of overloading, heat, suffocation, fright, viciousness, and from all other damages incidental to railroad transportation which shall not have been caused by the fraud or gross negligence of said railroad company." The contract further provided that the shipper should give written notice of any loss he might suffer or of any intention to claim dam-

ages. No written notice was given, but the plaintiff's agent, upon the receipt of the cattle in Norfolk, signed a receipt for them under protest, owing to their bad condition. The court refused to dismiss the complaint, and a verdict was given for the plaintiffs for two hundred and twenty-five dollars.

G. F. Bason, F. H. Busbee, and A. B. Andrews, Jr., for the appellant.

Edmund Jones and W. C. Newland, for the appellee.

936 DOUGLAS, J. This case was submitted to us on printed briefs for the plaintiffs, but was argued in behalf of the defendant both orally and by brief. It is perhaps proper to say that almost the entire brief of the defendant was devoted to proving a proposition that we have no disposition to deny, that is, that a common carrier can, by special contract, reasonably limit its common-law liability. But we cannot admit the assumed corollary that thereby it ceases to be a common carrier or ipso facto reverses the legal burden of proof. It is well established that where the negligence of the defendant is the primary cause of action, it must be alleged and proved by the plaintiff; but here, it is merely 937 incidental to the cause of action; in fact, it arises as a matter of defense. We must not lose sight of the real cause of action, which is the injury resulting from the failure of the defendant to seasonably transport and safely deliver livestock received by it as a common carrier. The plaintiff's case is fully made out when he has shown that the cattle were received by the carrier, and not seasonably and safely delivered—that is, not delivered at all, or delivered in a damaged condition, and after an unreasonable delay. The burden is then upon the defendant, and if it wishes to escape any part of its common-law liability by showing a special contract, it must affirmatively prove such contract, and bring the injury clearly within the terms of its exemptions. These principles have been so recently and so fully discussed by this court in *Mitchell v. Carolina Cent. R. R. Co.*, 124 N. C. 236, that any further elaboration seems needless, at least for the present. The essential principle is tersely and strongly stated by Chief Justice Faircloth in *Morganton Mfg. Co. v. Ohio River etc. Ry. Co.*, 121 N. C. 514, 61 Am. St. Rep. 679, where, speaking for a unanimous court, he says: "Among connecting lines of common carriers, that one in whose hands goods are found dam-

aged is presumed to have caused the damage, and the burden is upon it to rebut the presumption."

The rule is well stated in Greenleaf on Evidence, fourteenth edition, section 219, in the following language: "And if the acceptance was special, the burden of proof is still on the carrier to show, not only that the cause of loss was within the terms of the exception but also that there was on his part no negligence or want of due care."

That this rule, which at first was seriously questioned, is receiving almost general acceptance, would appear from the recent work of Elliott on Railroads, where the authors say in section 1548, on page 2403: "There is some conflict among the authorities as to the burden of proof in such cases; but the prevailing rule where the owner or his agent does not go with the stock is, that when the animals are shown to have been delivered to the carrier in good condition and to have been lost or injured on the way, the burden of proof then rests upon the carrier to show that the loss or injury was not caused by its own negligence." This rule, which is the natural result of the *prima facie* liability of the common carrier, is further strengthened by the universal acceptance of the principle that where a particular fact, necessary to be proved, rests peculiarly within the knowledge of a party, upon him rests the burden of proof: 5 Am. & Eng. Ency. of Law, 2d ed., 41; Best on Evidence, sec. 274; 1 Greenleaf on Evidence, sec. 79; Starkie on Evidence, sec. 589; Rice on Evidence, sec. 77; Selma etc. R. R. Co. v. United States, 139 U. S. 560, 567; State v. McDuffie, 107 N. C. 885, 888; Govan v. Cushing, 111 N. C. 458, 461; Mitchell v. Carolina Cent. R. R. Co., 124 N. C. 236. Some of the earlier cases appear to take the view that a common carrier ceases to be such when it makes a special contract and becomes a private carrier for hire. Whatever foundation may have existed for such an idea in the earlier days of the law, when common carriers were private individuals and carried their shipments in wagons or boats on the ordinary public highway, without receiving or asking any special privileges, has long since disappeared. A railroad company is at least a quasi public corporation, exercising one of the highest prerogatives of the sovereign—that of eminent domain. It is purely a creature of the law, and has no existence outside of its public capacity. It is a common carrier by virtue of its charter, and not by any supposed usage or contract with the shipper. Its charac-

ter as such is fixed by its contract with the state, and cannot be waived either by the corporation or the shipper. It may limit its liability to a certain extent by special contract, but cannot change its character. All such contracts of limitation, ⁹³⁹ being in derogation of common law, are strictly construed, and never enforced unless shown to be reasonable. Any doubt or ambiguity therein is to be resolved in favor of the shipper, and it has further been held that the burden of proof rested upon the carrier of showing that all such stipulations and exemptions were reasonable: *Campania etc. La Flecha v. Brauer*, 168 U. S. 104, 118; 4 *Elliott on Railroads*, sec. 1424; *Cox v. Central etc. R. R. Co.*, 170 Mass. 129; 9 *Am. & Eng. R. R. Cas.*, N. S., 591, 600; *Texas etc. Ry. Co. v. Reeves* (Tex., March 15, 1897), 8 *Am. & Eng. R. R. Cas.*, N. S., 429; 5 *Am. & Eng. Ency. of Law*, 2d ed., 326. Stipulations in a bill of lading are similar in their nature to conditions in a policy of insurance. It is well settled by the highest authority that if a policy is so drawn as to require interpretation and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured, and against the construction which would limit the liability of the insurer: *Imperial Fire Ins. Co. v. Coos Co.*, 151 U. S. 452; *London Assur. Assn. v. Campana de Moagens do Bareiro*, 167 U. S. 149.

In the case at bar it does not appear necessary for the plaintiff to resort to the burden of proof, as the unreasonable detention is in itself evidence of negligence. It appears from the evidence that the cattle were four days and three nights, that is, eighty-four hours, in reaching their destination, a distance of four hundred miles. At the present day the transportation of livestock over a great trunk line of railway at an average rate of less than five miles an hour cannot be considered reasonable diligence, in the total absence of explanation.

The only remaining question is whether the failure of the plaintiff to give formal written notice of his loss or intention to demand compensation is an absolute bar to his recovery, if otherwise entitled. We think not. The object of such a stipulation is not to relieve the carrier from its just liability, ⁹⁴⁰ for such a purpose would be clearly unlawful, but simply to give it such notice as will enable it by proper investigation to protect itself against unjust claims. It is not denied that the plaintiff signed the receipt for the cattle under protest. These words written upon the receipt would be ample notice

to the defendant that the plaintiff intended to enforce his rights. The meaning of those words is too well known in the business world to be capable of misconstruction. In the present instance they clearly meant that the plaintiff objected to receiving the cattle in their damaged condition, but did so under compulsion of circumstances to prevent still further loss, but at the same time retaining all his rights of action against the defendant. If the defendant's agent had desired any more specific notice or information, he might have asked for it after having been put upon notice, but this he did not see fit to do. Even if the protest had been merely verbal and not in writing, the stipulation might well have been deemed to have been waived under the circumstances. It appears from the uncontradicted testimony that the plaintiff suffered the injury and gave actual notice to the defendant of his claim for damages. We do not see why he cannot recover. Any other construction would convert what, properly construed, is a reasonable stipulation for the proper protection of the carrier into an instrument of fraud and a shield of wrong. This is so clearly explained by Justice Furches, speaking for the court, in *Wood v. Southern Ry. Co.*, 118 N. C. 1056, 1063, as to require no further comment. Judgment of the court below is affirmed.

THE DUTY AND LIABILITY OF CARRIERS OF LIVESTOCK are considered in the monographic notes to *Clarke v. Rochester etc. R. R. Co.*, 67 Am. Dec. 208-217; *Heller v. Chicago etc. Ry. Co.*, 63 Am. St. Rep. 548-566. If a carrier, having undertaken to deliver livestock, fails to deliver it in a safe condition within a reasonable time, a presumption of negligence arises, and the burden of proof rests on it to excuse itself from negligence and to show that the injury to the stock did not result from the delay: *Richmond etc. R. R. Co. v. Trousdale*, 99 Ala. 389, 42 Am. St. Rep. 69.

CARRIERS—SPECIAL CONTRACTS.—Common carriers will not be permitted to limit their liability by special contracts, unless they are fairly made, fully understood by the shipper, and clearly proved: See the monographic note to *Kirby v. Western Union Tel. Co.*, 46 Am. St. Rep. 779. And when a carrier claims exemption from liability to injury to goods under such contracts, the burden of proof is upon him to show that the damage resulted from the excepted causes stipulated for, and without his fault: *Johnson v. Alabama etc. Ry. Co.*, 69 Miss. 191, 30 Am. St. Rep. 534.

CONNECTING CARRIERS—DAMAGE TO GOODS.—Among connecting lines of carriers, the one in whose hands the goods in transit are found damaged is presumed to have caused such damage, and the burden of proof is upon him to rebut such presumption: *Morgantown Mfg. Co. v. Ohio etc. Ry. Co.*, 121 N. C. 514, 61 Am. St. Rep. 679. But see *Moore v. New York etc. R. R. Co.*, 173 Mass. 235, 73 Am. St. Rep. 298.

STATE v. HAY.

[126 North Carolina, 999.]

MAXIMS.—"THE PUBLIC WELFARE IS THE HIGHEST LAW," is the foundation principle of all civil government.

POLICE POWER—COMPULSORY VACCINATION.—In the valid exercise of the police power, the legislature may authorize municipal bodies to provide for compulsory vaccination and to establish penalties for its enforcement.

CONSTITUTIONAL LAW.—A STATUTE should be held to be unconstitutional only when clearly violative of some provision of the organic law which has restrained the legislative power.

POLICE POWER—COMPULSORY VACCINATION—DEFENSE—QUESTION OF FACT.—While the legislature in the exercise of the police power may provide for compulsory vaccination and establish penalties for its enforcement, yet such power must be exercised in a reasonable manner, and it is a sufficient excuse for noncompliance with the law that the condition of a person's health is such that it would be dangerous to submit to vaccination; the burden of proving such a defense is upon the person who sets it up, and is a fact to be found by the jury.

Criminal prosecution for violation of the following ordinance of the town of Burlington: "That all citizens of Burlington not successfully vaccinated within the last three years shall be vaccinated between this date (March 13, 1899), and Friday night, March 17th instant, 9 o'clock P. M., and all persons refusing to be vaccinated shall be fined ten dollars for every day they refuse, after being called upon by the doctors appointed, or imprisoned thirty days." The defendant refused to be vaccinated, because he had been advised that it would be dangerous for his health.

Attorney General, for the state.

Defendant not represented.

1000 CLARK, J. Chapter 214 of the Laws of 1893 is a well-considered and carefully drawn statute for the preservation of the public health. Section 23 thereof, which is specifically in regard to vaccination, contains, among other provisions, this clause: "The authorities of any city or town, or the board of county commissioners of any county, may make such regulations and provisions for the vaccination of its inhabitants under the direction of the local or county board of health or a committee chosen for the purpose, and impose such penalties as they deem necessary to protect the public health." There is no provision of the constitution which forbids the legislature

so to enact, and it is, indeed, an exercise of that governmental police power to legislate for the public welfare which is inherent in the general assembly, except when restrained by some express constitutional provision.

Salus populi suprema lex, "the public welfare is the highest law," is the foundation principle of all civil government. It is the urgent cause why any government is established, for, as Burke says: "All government is a necessary evil." It is, however, a much lesser evil than the intolerable state of 1001 things which would exist, if there were no government to bridle the absolute right of every man to do "that which seems right in his own eyes," like the Israelites in the days of Micah. The above maxim, quoted from Lord Bacon, is placed appropriately first by Broom in his treatise on Legal Maxims, with this just observation: "There is an implied assent on the part of every member of society that his own individual welfare shall, in cases of necessity, yield to that of the community; and that his property, liberty, and life shall, under certain circumstances, be placed in jeopardy or even sacrificed for the public good." This observation, which is almost a literal translation from Grotius, he fortifies by quotations from Montesquieu, Lord Hale, and many judicial opinions from both sides of the Atlantic. But it needs none, for it is every-day common sense that if a people can draft or conscript its citizens to defend its borders from invasion, it can protect itself from the deadly pestilence that walketh by noonday, by such measures as medical science has found most efficacious for that purpose. We know, as a historical fact, that prior to the discovery, one hundred and one years ago, of vaccination, by Edward Jenner, smallpox often destroyed a third or more of the population of a country which it attacked, and so futile was every precaution, and the most careful seclusion, that the greatest sovereigns fell victims to this loathsome disease which Macaulay has styled "the most terrible of all ministers of death." If this was so in days of imperfect communication, the present rapid means of intercourse between most distant points would so spread the disease as to quickly paralyze commerce and all public business if government could not at once stamp it out by compelling all alike, for the public good as much as for their own, to submit to vaccination. Statistics taken by governmental authority show that while four hundred out of every one thousand unvaccinated persons, exposed to the 1002 contagion, are at-

tacked by it, less than two in one thousand take the disease when protected by vaccination within a reasonable period. There are those, notwithstanding these well-ascertained facts, who deny the efficacy of vaccination, as there are always some who will deny any other result of human experience, however well established, but the legislature, acting in their best judgment for the public welfare upon the information before them, has deemed vaccination necessary for public protection, and their decision, being within the scope of their functions, must stand until repealed by the same power.

The power of the legislature to authorize county and municipal authorities to require compulsory vaccination has been exercised by nearly every state and has been recently sustained by the highest courts of two of our sister states: *Morris v. Columbus*, 102 Ga. 792, 66 Am. St. Rep. 243; *Blue v. Beach* (Ind., Feb. 1, 1900), 56 N. E. Rep. 89, and there are no decisions to the contrary. In reply to the argument that such exercise of power by the legislature may in some cases infringe upon individual rights, Cobb, J., in the Georgia case just cited, well says: "No law which infringes upon the natural rights of man can be long enforced. Under our system of government, the remedy of the people in that class of cases where the courts are not authorized to interfere is at the ballot-box. Any law which violates reason and is contrary to the popular conception of right and justice will not remain in operation for any length of time, but courts have no authority to declare it void merely because it does not measure up to their ideas of abstract justice. The motive which doubtless actuated the legislature in the passage of the act now under consideration was that vaccination was for the public good. In this the general assembly is sustained ¹⁰⁰³ by the opinion of a great majority of the men of medical science, both in this country and in Europe."

But even if we were of opinion with the small number of medical men who contend that vaccination is dangerous to health, and not a preventive of the disease, the court is not a paternal despotism, gifted with infallible wisdom, whose function is to correct the errors and mistakes of the legislature: *Brodnax v. Groom*, 64 N. C. 244, 250. Our people are self-governing, and themselves correct the mistakes of their representatives. The function of the courts is to construe and apply the laws, and they can hold a statute nugatory only when

plainly and clearly violative of some provision of the organic law which has restrained the legislative power: *Sutton v. Phillips*, 116 N. C. 502; *White v. Murray*, 126 N. C. 153.

Nor does section 23 of the act require that the board of aldermen shall pass such ordinance in conjunction with the board of health, as defendant contends. It merely provides that the execution of the ordinance, i. e., the vaccination, shall be under the direction of the local board of health or a committee appointed by the aldermen.

While the legislature has power to authorize municipal bodies to provide compulsory vaccination, and the defendant did not comply with the ordinance enacted by the town of Burlington, in pursuance of such authority, though afforded opportunity to do so, it is true that there may be some conditions of a person's health when it would be unsafe to submit to vaccination, and which, therefore, would be a sufficient excuse for noncompliance, but it does not vitiate the ordinance that such exception is not provided for and specified therein. It is not a defense that a person bona fide believes that it will be dangerous for him to be vaccinated or believes that he is already sufficiently protected by former vaccination; nor ¹⁰⁰⁴ would the opinion of his personal physician on either point be conclusive (though it would naturally have weight with the jury), for there may be evidence or circumstances tending to the contrary. Indeed, as to a former vaccination being sufficient protection, the opinion of the official physician supervising the vaccination should be presumptively correct. That which would relieve from a compliance with the ordinance is a matter of defense, the burden of which is upon the defendant, and is a fact to be found by the jury. The special verdict is ambiguous and defective in this particular and is set aside. Let there be a new trial.

DOUGLAS, J., concurring. While I concur in the judgment of the court, I fear that there are some expressions in the opinion that may be misconstrued.

What I understand the court to mean is, that while it is in the province of the legislature to provide for the public health by all reasonable means, and incidentally to confer that power upon municipal corporations, yet whenever the exercise of that power is in derogation of natural right, it must be exercised in a reasonable manner. Compulsory vaccination is not an un-

reasonable requirement, as experience has shown that it is in times of epidemic necessary for the protection of the community and equally so of the individual. It is ordinarily less harsh than quarantine or isolation, and in the great majority of cases has no injurious effect beyond some slight temporary illness. But there may be cases where vaccination, owing to certain exceptional conditions of health, may be dangerous or even fatal. We cannot suppose that the legislature intended to enforce the rule under such circumstances, and yet there must be some tribunal competent to determine when such conditions exist. By its very nature ¹⁰⁰⁵ this power must ultimately rest in the courts, where all other rights of the citizen are determined and administered. Where legislative authority is given, the board of aldermen can determine within reasonable limits the existence of the general conditions justifying compulsory vaccination, and may make and enforce all reasonable regulations necessary to carry it into effect; but in case of resistance it can enforce it only by an appeal to the criminal jurisdiction of the courts. There the defendant has a right to be heard. It may be that his refusal to comply with a general ordinance might cast upon him the burden of proving whatever facts he might rely upon to exempt him from its operation; but this question is not now before us. I do not think that the election of anyone as superintendent of health or his employment as vaccinating surgeon would add anything to the weight of his testimony. It might give him the power to demand the vaccination of the individual, and to prosecute in case of refusal, but it would not carry with it any presumption of professional infallibility. He must take his chances before the jury like any other witness. I readily concede that these positions are generally filled by competent men, but we know that they are rarely held by physicians of large practice, because they do not pay enough to justify their acceptance. This is especially so where smallpox is prevalent. No well-established physician could afford to run the risk of contagion which would inevitably cause the loss of his practice. So strong is this feeling that it is sometimes necessary to send to other cities, and even other states, to obtain men willing to undertake the duty. I do not say this in any disparagement to them, but simply in justice to the resident physicians, who are entitled to all the credit due their character and professional standing.

I think this construction of the law is clearly in accord with the legislative intent, but if it were otherwise I could ~~1000~~ not come to any other conclusion. The constitution of this state expressly declares: "That we hold it to be self-evident that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness": Const., art. 1, sec. 1. It does not profess to confer these rights, but recognizes them as pre-existing and inherent in the individual by "Right Divine." Therefore, any unlawful interference with them is in violation of the express letter of the constitution.

When man entered the social compact he gave up a portion of his natural liberty in exchange for the protection of society, but only so far as was demanded by the general welfare. Even then there must be some limit. Suppose the legislature should pass an act that all persons afflicted with certain diseases should be killed in order to prevent contagion, would any court permit its enforcement? Therefore, can we suppose that the legislature either would or could enforce vaccination if under the peculiar conditions of health of the patient it might reasonably be expected to endanger his life? This discussion, however, is not essential to the determination of the case at bar, as I feel safe in basing my opinion upon a reasonable interpretation of the legislative will without the necessity of resorting to constitutional limitations.

Furchee, J., concurred in this concurring opinion.

VACCINATION, COMPULSORY.—The legislature has power to pass an act compelling vaccination: *Morris v. Columbus*, 102 Ga. 792, 66 Am. St. Rep. 243. See, further, *State v. Burdge*, 95 Wis. 890, 60 Am. St. Rep. 123; monographic note to *Hurst v. Warner*, 47 Am. St. Rep. 546, 547.

CASES
IN THE
SUPREME COURT
OF
OHIO.

JULIER v. JULIER.

[62 Ohio State, 90.]

DOWER—RIGHT OF DIVORCED WIFE—STATUTORY CONSTRUCTION.—The statute of Ohio, giving to a divorced wife a right of dower in the real estate of the husband not allowed her as alimony, is enabling in its character. It creates no disability, nor does it impose any restraint on the power of the divorced wife to release her dower right, in any lawful mode, either when the divorce is granted or at any time thereafter.

DIVORCE—JURISDICTION—AGREEMENTS AS TO ALIMONY.—Under a prayer for general relief in an action for divorce, properly instituted, it is within the jurisdiction of the court to settle and adjust by its judgment the rights of the parties with respect to the amount and nature of the alimony that shall be awarded and the terms and conditions of its payment; and in doing so it may confirm and carry into effect, by its decree, any just and reasonable agreement between the parties concerning the same.

DIVORCE—ALIMONY IN LIEU OF DOWER—JURISDICTION TO ORDER RELEASE—DECREE AS A BAR.—Under the statute of Ohio the right of dower is preserved after a divorce granted by reason of the husband's aggression, but the parties to a suit for divorce in that state may agree between themselves that the wife shall have alimony in her husband's real estate in lieu of dower, and that the wife shall release her right of dower, and the court has jurisdiction, upon granting the divorce, to order the wife to execute such release, but if she fails to do so by the time appointed the decree will, under the statute of that state, operate as such release, and will bar her right of dower as effectually as if she had executed and delivered the release.

ESTOPPEL—AGREEMENT TO ACCEPT ALIMONY IN LIEU OF DOWER.—A wife, who has made a just and reasonable agreement, in a divorce suit, concerning an allowance of alimony to her in lieu of dower, which agreement has been confirmed and carried into effect by the court, in its decree, is, at least so long as the decree remains in force, estopped from alleging or proving that the agreement was unlawful, as contravening public policy.

DOWER—ACTION FOR, BY DIVORCED WIFE—DECREE OF DIVORCE AS A BAR.—If a wife, by agreement with her husband, accepts alimony in lieu of dower in her husband's real estate, and the agreement is confirmed and carried into effect by the court, in its decree, wherein the wife is ordered to execute, within a certain time, a release of her dower right, but she fails to do so and sues for dower after receiving the alimony awarded, the decree is a legal bar to the action, although the agreement was pleaded and proved in support of the defense, it being neither necessary to establish the defense nor competent to invalidate the decree.

DIVORCE—IGNORANCE OF PROVISIONS OF DECREE AND ATTORNEY'S WANT OF AUTHORITY—PLEA OF—WHEN UNAVAILING.—A wife who has accepted and, for more than ten years, retained the fruits of a decree allowing her alimony in lieu of dower in her husband's real estate, and which decree was taken by her attorney of record, cannot, where no fraud or collusion is charged, be released from the obligation of the decree on the ground that she was ignorant of its provisions as entered of record, or that her attorney was without authority to have it so entered.

Suit for dower, brought by a divorced wife. In 1897 Jane Julier, the defendant in error, commenced an action against William G. Julier and others, the plaintiffs in error, for the assignment of dower in certain real property. The petition alleged, in substance, that the plaintiff was married to George C. Julier in 1856, and obtained a divorce from him for his aggression in 1888; that during the coverture he was the owner of the property described, and died seised of the same in 1896, and that the estate was held by the defendants. The judgment in the divorce case was pleaded as a bar to the claim for dower. An agreement made, by way of compromise, between the parties to the divorce suit, and concerning the wife's alimony, that the wife should "proceed, without unreasonable delay, to file her petition for divorce and alimony" for the cause of adultery of late occurrence, and that she should accept an allowance of alimony in lieu of dower; and, in pursuance of this agreement, it was decreed that the plaintiff, within ten days after the entry of judgment, should execute and deliver to the defendant a release of her dower right in her husband's real estate, and that the plaintiff be enjoined from setting up any claim to such real estate, except in so far as the alimony allowed her was made a lien thereon. The plaintiff admitted the decree and payment of alimony thereunder, but replied that that part of the decree relating to the release of her dower was void for want of jurisdiction, and was entered without her knowledge or consent. The common pleas sustained the defense, and the petition was dismissed, but on appeal to the circuit court dower was awarded to the plaintiff, that court holding that the plaintiff was not

estopped to assert her right of dower; that she had not conveyed or released her dower estate; that the contract entered into prior to the commencement of the plaintiff's action for divorce was against public policy and void; that the plaintiff was not bound, under the contract with her husband, to convey or release her dower estate; and that the judgment and decree of the common pleas, in the divorce suit, in so far as it undertook to deprive the plaintiff of her right to assert a claim of dower in the premises, was void. The petition for divorce contained a prayer for general relief. There was a petition in error to reverse the judgment of the circuit court.

Johnson & Hackney, for the plaintiffs in error.

Henderson & Quail, for the defendant in error.

¹⁰⁰ WILLIAMS, J. The prevailing rule, when not affected by statute, appears to be that after the dissolution of marriage by divorce the wife is not entitled to dower in lands possessed by the husband during the coverture, or at the time of his death, for the reason that marriage at the death of the husband is essential to the right of dower in his estate. The right accrues, it is said, to widows and not to divorced wives. A different rule has been established in this state by statute (now section 5699) by which it is provided that when a divorce is granted by reason of the husband's aggression the wife, if she survive him, "shall be entitled to dower in the real estate of the husband not allowed her as alimony, of which he was seised at any time during the coverture and to which she had not relinquished the right of dower."

It cannot well be contended that, in order to bar this dower right of a divorced wife, it is necessary the relinquishment should be made before the divorce is obtained, nor that it may not be accomplished, where the proceedings are regular, by a provision in the decree of divorce. The statute, however, is enabling ¹¹⁰ in its character giving a right of dower where without it none existed. It creates no disability nor imposes any restraint on the power of the divorced wife to release her dower right in any lawful mode, either when the divorce is granted or at any time thereafter. And a judgment of a competent court having jurisdiction of the parties and subject matter may be as effectual a bar as a release by deed.

The rule that obtained in chancery with respect to the effect of a decree for a conveyance and the method of enforcing it has

been somewhat enlarged by our legislation (now section 5318), by which it is enacted that: "When the party against whom a judgment for a conveyance, release, or acquittance is rendered does not comply therewith by the time appointed, such judgment shall have the same operation and effect and be as available as if the conveyance, release, or acquittance had been executed conformably to such judgment." So that, if the court by which the judgment in the divorce case was entered was clothed with the necessary jurisdiction to render the same, the rights of the parties in this case are precisely the same as if the defendant in error had duly executed and delivered the deed of release as therein ordered.

The jurisdiction of the court in that case to render that part of the decree which relates to the release by the plaintiff therein of her right of dower is contested here, on the ground that the plaintiff's dower right was not a subject matter before the court for adjudication; and that it was not as a separate and independent subject of adjudication may be conceded. But under a prayer for general relief in an action for divorce, properly instituted, it is within the jurisdiction of the court to settle and adjust by its judgment the rights of the parties with respect to the amount and nature of the alimony that shall be ¹¹¹ awarded the wife, and the terms and conditions of its payment; and it appears to be well settled that in awarding the alimony the court may, in its discretion, and generally will, confirm and carry into effect by its decree any agreement which the parties have entered into concerning the same that the court deems just and reasonable and in doing so may adjudge the conveyance of real property by one to the other, in pursuance of such agreement. It is laid down as a general rule in *Nelson on Divorce and Separation*, section 915, that: "The agreement of the parties with respect to permanent alimony is valid, and will generally be approved by the court, and a decree may be entered in conformity to it." In the absence of a saving provision by statute as has already been noticed, all right of dower in the husband's lands ceased on the dissolution of the marriage relation by divorce; and when, on granting an absolute divorce, a provision was made for the wife either in a general decree for alimony or in a decree entered in conformity with the agreement of the parties, such provision was presumed to be in lieu of dower. And where by statute the right of dower is preserved after divorce, it seems to be an established rule that the court

may make an allowance of alimony in lieu of the dower, especially where the parties have so agreed: Nelson on Divorce and Separation, sec. 909. In *Owen v. Yale*, 75 Mich. 256, it was held that a consent decree made after the announcement by the court that a divorce would be granted providing for such divorce and for the payment of a gross sum as alimony, "to be in full of all claims of the complainant against the defendant or his property, which payment has been made according to the terms of the decree, is a bar to any claim of the wife to dower." Among other cases which sustain the jurisdiction of the court in divorce cases to render such decrees, and their binding force on the parties are *Reed v. Reed*, 86 Mich. 600; *Tatro v. Tatro*, ¹¹² 18 Neb. 395, 53 Am. Rep. 820; *Calame v. Calame*, 24 N. J. Eq. 440; *Webster v. Webster*, 64 Wis. 439; *Twing v. O'Meara*, 59 Iowa, 326. On this subject it is sensibly said by Ashburn, J., in *Petersine v. Thomas*, 28 Ohio St. 596, 599, that: "Under our statute a divorce contemplates a final separation of the parties. Their paths in life henceforth diverge and, in legal contemplation, they are to each other as strangers. When not otherwise provided, we think the statute contemplates that, at the time of decreeing the divorce, the court will adjust all the pecuniary rights of the parties in relation to each other springing out of the marital relation about to be forever annulled. To this end the court is given full discretionary authority to make such order concerning the division of the property and support of the children as to the court shall appear, under all the facts and circumstances, just, equitable, and reasonable."

The parties in the case before us were competent under the statute to contract with each other, and there is no reason why, in agreeing upon the amount that should be paid the wife in money, they might not stipulate for the release of the interest of either in the property of the other. The decree itself is conclusive evidence that the court was satisfied the agreement on which it was rendered was reasonable and just in all of its provisions as carried into the decree, all of which, in our opinion, it was within the jurisdiction of the court to confirm and enforce by its judgment.

An objection is made to the operation of the decree in question as a bar to the right of dower claimed, on the ground that the agreement on which the decree is founded is an unlawful one; the stipulation looking to an immediate divorce being, it is said, against public policy and rendering the whole contract

void. This objection is not available. The alleged infirmity does not appear in the decree nor in the record of that case. The agreement, whatever ¹¹³ its terms, was merged in the judgment, which, being regular on its face, and, as has been seen, rendered by a court of competent jurisdiction, is supported by the conclusive presumption that every fact necessary to sustain it was properly brought before the court. The judgment cannot be impeached except by a direct proceeding to reverse or annul it. And even in a proceeding of that character the party asserting the illegality of the agreement as a ground of relief would find serious obstacles in the way of obtaining any assistance from the courts. Certainly, as long as the decree remains in force the parties to it are estopped from alleging or proving the agreement was illegal or disputing its validity: *Bank of Wooster v. Stevens*, 1 Ohio St. 233, 59 Am. Dec. 619.

It is urged, however, that as the defendants below pleaded and proved the agreement in support of their defense, they brought themselves within that principle which denies the aid of the courts to those who are parties to illegal transactions. That principle is not applicable to them. The agreement was no longer executory. It was executed by the decree as fully as if the wife in pursuance of it had lawfully made and delivered a deed of release of her dower right. Resort to the agreement was unnecessary in order to establish the right to the relief the defendants were seeking. The decree, unaided by any other fact, constituted the legal bar they set up to the dower claimed. . And though they pleaded the agreement, and, assuming the burden imposed by the court, produced it in evidence, it did not affect the validity or operation of the decree, but was as harmless as it was immaterial, being neither necessary to establish the defense nor competent to invalidate the decree.

The remaining objection made to that part of the decree in question is, that it was made a part thereof and so entered of record without the knowledge ¹¹⁴ or consent of the defendant in error, the plaintiff in that case. It is admitted that the attorney who took the decree in behalf of the plaintiff had full knowledge of its contents as entered and agreed to all of its provisions; and that he was authorized to represent the plaintiff in the bringing and conduct of the suit and in all things pertaining to her interests in the case, including the making of all proper arrangements for securing to her the most advantageous provisions for alimony out of the husband's estate. There was

no express limitation on his authority in this respect. The plaintiff relied on his skill and judgment. In making the arrangement in her behalf he no doubt deemed it advisable and beneficial to his client that she should relinquish her inchoate dower in order to obtain a larger amount of alimony in money than she would otherwise be able to obtain; and in so securing for her, by the surrender of a mere contingency that might never ripen into any actual value, something of present and substantial value, we are not satisfied he violated his professional trust, nor that the decree entered in pursuance of the agreement is void.

Besides, no fraud is charged against the defendant in that case, or his attorney, nor any collusion with the attorney of the plaintiff. The decree, being a public record in her own case, was certainly sufficient to charge her with constructive notice of its provisions after its rendition; and the record here fails to show that she has not, at all times since, had actual knowledge of those provisions. Her pleading and the finding of the court on that subject in this case go no further than that the feature now objected to was inserted in the decree and so entered without her knowledge; and though not important, it may be observed that the plaintiff, who alone could know what knowledge she possessed, was not produced as a witness. She did not choose to avail herself of her remedy, if she could show sufficient grounds therefor, ¹¹⁵ by a direct proceeding to have the decree vacated or opened up, to which she might have resorted at any time short of the statutory bar, but permitted the decree to remain unquestioned until the commencement of the action below, more than ten years subsequent to its rendition, and in the meantime accepted and retains all the fruits of the judgment, all that was beneficial to her. Upon no sound principle of law or justice can she now be released from the obligations of the judgment on the plea that she was ignorant of its provisions as entered of record, or that her attorney was without authority to have it so entered.

The judgment rendered in the circuit court in the first of these cases, awarding dower to the defendant in error, will be reversed, and judgment rendered for the plaintiffs in error. And the orders and proceedings in the second case, being founded on the judgment in the first one, must also be reversed and set aside.

Judgment accordingly.

DOWER—RIGHT TO—HOW AFFECTED BY DECREE OF DIVORCE.—That a decree of divorce bars all claim to dower, see *Wood v. Wood*, 59 Ark. 441, 43 Am. St. Rep. 42. But a wife's right of dower, which is vested in her prior to divorce, is not divested thereby, unless the statute has expressly so declared: *Van Cleef v. Burns*, 118 N. Y. 549, 16 Am. St. Rep. 782. At the present time, generally, as the result of statutory provisions on the subject, an absolute divorce does not defeat a wife's right to dower in the previously acquired land of her husband where such divorce is not the result of any misconduct on her part: See the monographic note to *Sanders v. McMillan*, 39 Am. St. Rep. 30, on assignment of dower. A wife's right to dower continues after divorce, unless she voluntarily relinquishes it, or it is barred for one of the causes prescribed by statute, or she is, by some rule of law or equity, precluded or estopped from asserting it: *Adams v. Storey*, 135 Ill. 448, 25 Am. St. Rep. 392.

DOWER—DIVORCE—ALIMONY—ESTOPPEL.—A decree of divorce in favor of a wife, with a provision for permanent alimony, bars dower: *Tatro v. Tatro*, 18 Neb. 395, 53 Am. Rep. 820. A wife cannot have both dower and that which is given in lieu of dower out of the same property. Hence if, upon a decree of divorce in favor of a wife, entered by consent, she is given a secured annuity for life, the annuity so decreed will be presumed to have been in lieu of dower, and if she receives it during her husband's life and after his death, she will be estopped from claiming dower in the real estate of her husband securing such annuity: *Adams v. Storey*, 135 Ill. 448, 25 Am. St. Rep. 392. Compare *Lively v. Paschal*, 85 Ga. 218, 89 Am. Dec. 282.

OVERTURF v. GERLACH.

[62 Ohio State, 127.]

CREDITOR'S SUIT.—THE FEES AND COMPENSATION OF AN EXECUTOR OR ADMINISTRATOR cannot be reached by a creditor during the administration of the estate and before they have been allowed by the probate court.

Action commenced in the common pleas by Gerlach against Overturf and others. The plaintiff was a judgment creditor of Overturf and sought to have applied to the payment of his judgment the fees, commissions, etc., of Overturf as executor of two certain estates, on the ground of the latter's insolvency and his inability to have satisfaction of his judgment. The petition alleged that the defendant, Overturf, had no property on which an execution could be levied, and prayed for a finding of the amount due the plaintiff. It was also prayed that a receiver be appointed to receive and collect the "fees, commissions, compensations, and rewards," due Overturf in the administration of the estates; that such receiver apply them to the amount due the plaintiff; and that an order issue restraining their payment to Overturf as an individual. The case was ap-

pealed to the circuit court, which rendered a judgment for the plaintiff and appointed a receiver. The defendant brought error.

A. T. Holcomb, for the plaintiff in error.

T. C. Anderson, for the defendant in error.

¹²⁰ MINSHALL, J. The question presented in this case is whether the fees and compensation of an executor or administrator may be reached by a creditor during the administration of the estate. Generally, subject to some exemptions, any sum of money due a debtor may be reached in a proper proceeding by his creditor where he refuses to apply it to the claim of the creditor: Rev. Stats., sec. 5464. But the money must be due or to become due, subject to no other condition than the lapse of time, for the proceeding ¹²⁰ presupposes the power to order without qualification the payment of money due the debtor from another to the debtor's creditor. In the case before us these conditions do not exist. Overturf, whatever the assets of the two estates may be, may not be entitled to the compensation and commissions provided by law at his final settlement. This will depend upon the judgment and allowance of the probate court. By reason of maladministration he may be entitled to nothing, and nothing may be allowed him. Hence, until one or the other of the two estates on which he is administering has been settled, or some allowance has been made him by the probate court, it cannot be said that anything is due him therefor.

It will be observed that there is no averment in the petition that any sum has been allowed the executor in either case; nor is there any such finding of fact. The statute (Rev. Stats., sec. 6188) does not say that the commissions there provided for shall be allowed the executor or administrator, but that they "may," and this will depend upon the conditions before stated.

The defendant in error claims that the question is ruled by *Newark v. Funk*, 15 Ohio St. 462. But that case is quite distinguishable from this. There the attachment was a part of the salary of the marshal of the city that he had permitted to accumulate in the treasury. It was due and payable. The court in deciding the case was careful to say: "We do not say nor suppose that a salary that is not yet earned, or for the payment of which the proper period has not yet arrived, can be garnisheed or attached. It must be a subsisting claim, due or

to become due, and for the ultimate payment of which the obligation to pay is fixed, without reference to future services or considerations." There is, then, a marked difference in the two cases.

It might be further observed that to permit the fees and compensation of an administrator to be ¹³¹ attached before they have been earned, or allowed by the probate court, would be productive of much embarrassment in the settlement of estates, and interfere with the jurisdiction of the probate court in their settlement. Such an attachment would probably require the removal of the executor or administrator, as without this being done no court could determine but that at final settlement it would be unable to do that justice between the estate and the administrator which the circumstances might require.

Whilst the embarrassment that might affect the public service in the attachment of the salary of a public officer was not regarded, in the case above cited, of such a grave character as, on grounds of public policy, to forbid its adoption by a creditor, yet its impolicy in the case of administrators, for the reasons stated, is more apparent than in the case of public officers, and has not been sustained by any court. Without the appointment of a receiver, as was done in this case, the order on the administrator would be of little avail. This would be likely to result in a conflict between two courts, to some extent exercising jurisdiction over the same subject matter—the assets of the estate of a deceased person. The receiver acting under the order of the court appointing him, and the administrator under that of the probate court, which, in case of a conflict, should determine whether a given sum should be paid the receiver, the common pleas, or the probate court? Surely, the common pleas could not, without invading the jurisdiction of the probate court, do so; so that the appointment of a receiver would be of no avail; and this shows that such a practice would not be well founded in principle; and yet, as before suggested, without the appointment of a receiver little or nothing could be accomplished.

Judgment reversed and petition below dismissed.

PROPERTY IN CUSTODIA LEGIS CANNOT BE ATTACHED. Hence, executors or administrators are not subject to garnishment, because it would disturb the law of administration to allow it: *Brewer v. Hutton*, 45 W. Va. 106, 72 Am. St. Rep. 804. That moneys earned may be reached in a creditor's suit, though not due, see extended note to *Massey v. Gorton*, 90 Am. Dec. 294, discussing creditors' suits.

CINCINNATI VOLKSBLATT CO. v. HOFFMEISTER.

[62 Ohio State, 189.]

INJUNCTION—STOCKHOLDER'S RIGHT TO INSPECT BOOKS AND RECORDS.—The proper remedy to enforce the statutory right of a stockholder in a corporation to inspect the books and records thereof is by injunction.

CORPORATIONS—INSPECTION OF BOOKS AND RECORDS—SUFFICIENCY OF PETITION FOR.—It is not necessary for a stockholder in a corporation, who demands an inspection of its books and records, to state in his petition what his reasons are for desiring it, or to show that he is actuated by proper motives and in the pursuit of justifiable ends. It is sufficient for his petition to show that he is a stockholder; that he has requested such inspection to be made at a reasonable time; and that his request has been refused.

CORPORATIONS—RIGHT TO INSPECT BOOKS AND RECORDS—INCIDENTS OF.—The right of a stockholder to take copies of the books and records of a corporation is incidental to his right to inspect them, and such rights may be exercised by the stockholder himself or by his agent. Furthermore, the right of inspection is not limited to one inspection, but may be exercised, at any reasonable time, so long as the relation of stockholder exists.

Hoffmeister, the defendant in error, was a stockholder in the Cincinnati Volksblatt Company, a corporation, and made a request of it to allow him to inspect its books and records and to fix a reasonable time therefor. The company refused to allow him to make such inspection at any time, whereupon Hoffmeister filed a petition stating these facts, and praying that the company be enjoined from refusing to permit him to make such inspection. The company's demurrer was overruled and its answer alleged a want of good faith on the plaintiff's part. The trial court found that the plaintiff was entitled to make such inspection, at any reasonable time, either by himself or by agent, bookkeeper, or accountant, and that he might also take copies of such books and records. Judgment was entered enjoining such inspection and permitting copies to be so taken. This judgment was affirmed by the general term of the superior court, and the company brought error.

Charles W. Baker, for the plaintiff in error.

Alfred W. Benedict and Jerome D. Creed, for the defendant in error.

¹⁸⁶ SPEAR, J. It is argued in support of the petition in error that the plaintiff has mistaken his remedy; that if he has

any it is by mandamus, and not by injunction, and that the superior court is without jurisdiction—that court having no jurisdiction in mandamus. Also, that sufficient facts are neither stated in the petition nor proven to entitle the plaintiff to any injunction whatever, and that, under any possible showing, he was not entitled to the sweeping order that the court made.

1. The proper form of action. As to mandamus our statute (Rev. Stats., sec. 6741) provides: "Mandamus is a writ issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which ¹⁹⁷ the law specifically enjoins as a duty resulting from an office, trust, or station." And by section 6744 it "must not be issued in a case where there is a plain and adequate remedy in the ordinary course of the law." In some jurisdictions the remedy of mandamus is given to right wrongs similar to the one here complained of. We are not, however, concerned with the law of other states, but with that of our own, and it seems hardly necessary to take space to demonstrate that in Ohio mandamus is not, but that injunction is, the proper remedy in a case of this nature. The complaint of plaintiff is that he is unlawfully prevented from the enjoyment of a right which is incident to his ownership of stock, and his remedy is that the corporation be compelled to desist from such deprivation. This does not call for the performance of an act which the law specifically enjoins. It is, on the other hand, an act which may be compelled by injunction in the common and ordinary exercise of that power. There is, therefore, a plain and adequate remedy open to him in the ordinary course of the law, for, within the meaning of this statute, an equity proceeding is a proceeding of that character. There is, in the opinion of the writer, another and perhaps better reason than the foregoing for the conclusion announced (*Fraternal Mystic Circle v. State*, 61 Ohio St. 628, 76 Am. St. Rep. 446), but the one given is deemed sufficient for the purposes of this case: *Freon v. Carriage Co.*, 42 Ohio St. 30, 51 Am. Rep. 794; *State v. Carpenter*, 51 Ohio St. 83, 46 Am. St. Rep. 556.

2. It being determined that the action was properly brought and that the court had jurisdiction, is the petition sufficient, or must the plaintiff, before he can have standing in court, set out what his reasons for desiring the inspection asked are, and show that he is actuated by proper motives and in the pursuit

of justifiable ends? Such is the contention of plaintiff in error. The statute is (section 3254): "And the books and records of such corporation shall ¹⁹⁸ at all reasonable times be open to the inspection of every stockholder." But it is insisted that this provision is not intended to enlarge the right, but is a mere affirmation of the common-law rule, and that that rule embodies many conditions, among them that the stockholder must allege and prove that he is acting in good faith. Without stopping to discuss the extent of, and the limitations upon, the rule as established by the common law (for the holdings are at variance upon it), we inquire what reason there is for saying that the intent of the legislature was to merely affirm the common-law rule? If that had been all, why take the trouble to legislate on the subject at all? Is it not more reasonable to conclude that the object was to get rid of all uncertainty and of various conditions, whatever they were, and establish the right by a rule, clear, direct, simple, and practically without qualification? The language is plain. The right given is clear. One condition, and one only, is attached, viz., that the right can be exercised only at reasonable times. Ordinarily, the motive or purpose of the party who is in the exercise of, or is about to exercise, a clear legal right is unimportant: *Letts v. Kessler*, 54 Ohio St. 73, and authorities cited; *McDonald v. Smalley*, 1 Pet. 620. A like rule prevails as to one's pursuit of an equitable remedy: *Morris v. Tuthill*, 72 N. Y. 575; *Davis v. Flagg*, 35 N. J. Eq. 491; *Thompson on Corporations*, sec. 4412, and authorities cited. No reason is apparent why the rule should not apply to the case at bar. We are of the opinion that where a suitor demands the enforcement of a clear right given him by law, whether the remedy be legal or equitable, his motive for such action is not a proper subject for judicial investigation. The petition stated a cause of action, and if supported by the evidence warranted the granting of equitable relief.

3. Was the order of the trial court too broad? The finding by the court of all the issues for the ¹⁹⁹ plaintiff settles the questions of fact for this court, but it is not improper to add that there was an entire failure to show on the part of defendant that the plaintiff was acting from the improper motives charged in the answer, and that the evidence, all of which we have read and considered, fully justifies the finding in favor of the plaintiff. So that even had the petition been obnoxious to a demurrer in failing to allege a proper purpose for the suit,

the defendant, having obtained a full hearing on the charges stated in the answer, would have no ground of complaint on account of the action of the court on the demurrer.

The contention is that whatever right of examination the statute gives is a personal right, and must be exercised by the stockholder in person. Since when, we would inquire, has it been the law that one who has given him a clear right as to property may not exercise it by any proper agent? The proposition has the quality of novelty, but it is not sound. It must be apparent on reflection that if so circumscribed a limit were placed on the right, its exercise in many instances would be futile: *Foster v. White*, 86 Ala. 467; *Mitchell v. Rubber etc. Co.* (N. J. Eq., June 4, 1892), 37 Corp. Cas. 42, and notes, and same case in 24 Atl. Rep. 407; *State v. Bienville Oil Works*, 28 La. Ann. 204.

Nor is the right limited to one inspection. It is an incident to ownership of stock, and may be exercised at any reasonable time, so long as the relation of stockholder subsists. The right to take copies from the records follows as an incident to the right to inspect. It rests, as does the entire right to examination rest, upon the broad ground that the business of the corporation is not the business of the officers exclusively, but is the business of the stockholders: *Phoenix Iron Co. v. Commonwealth*, 113 Pa. St. 563; *Mutter v. Eastern etc. Ry. Co.*, L. R. 38 Ch. Div. 92.

We refrain from extended discussion of the questions ²⁰⁰ involved, because they are fully and ably discussed and the authorities cited at large in the briefs of the respective counsel which precede, and to which attention is here directed.

We would add, however, that the rights of the plaintiff in this case are based upon a recognition of his standing as an integral part of the corporation. The idea that the corporation is an entity distinct from the corporators who compose it has been aptly characterized as "a nebulous fiction of thought." Much learning has been indulged in and much space occupied by text-writers and others in an effort to differentiate the essential character of a corporation from that of its stockholders and great ingenuity has been displayed in the argument, but it has been in the main a fruitless metaphysical discussion. For the purpose of description, and in defining corporate rights and obligations, and characterizing corporate action, the fiction that the corporation is an artificial person or entity, apart from its

members, may be convenient and possibly useful, but in the opinion of the writer the argument favoring the essential separate entity of the corporation fails, and it is believed that the effort has resulted in misleading conceptions and in much confusion of thought upon the subject. When all has been said it remains that a corporation is not in reality a person or a thing distinct from its constituent parts, and the constituent parts are the stockholders, as much so in essence and in reality as the several partners are the constituent parts of the partnership. Stripped of misleading verbiage, the corporation is a device created by law whereby an aggregation of persons who may avail themselves of its privileges by organization are permitted to use their property in a way different from that which is permitted to others who do not so organize, and with certain special advantages, among which are a measure as to personal liability for debts and the power to perpetuate the organization²⁰¹ denied by the law to all others. With this conception of a corporation it would seem to follow as matter of course that the property of a corporation, although subject under some conditions to rights of creditors, is, in the last analysis, that of the stockholders, and that when one seeks an inspection of its books, records, or property he is in reality but seeking an inspection of his own, and that this should be accorded fully, freely, and at all times when such inspection will not unreasonably inconvenience others who have like interest in and rights to the property, and that the attempt to unreasonably hamper such inspection by officers, managers, or others is an unjust exercise of power, and one which courts should not sanction.

Nor can the officers of the corporation or the other stockholders justly complain. They have chosen this method of investing their means and conducting the business for personal profit, a method which, as we have seen, is especially favored by the law, and they should expect to endure such inconveniences and such chances of exposure of management as the method entails. In other words, it is not unreasonable that they should be required to take the bitter with the sweet.

No error is found in the judgments of the courts below, and they will be affirmed.

CORPORATIONS—RIGHT TO INSPECT BOOKS AND PAPERS—MANDAMUS.—A stockholder has the right to inspect the books and papers of a corporation under a statute giving him, at all reasonable times, the right to examine the records and books of account of the corporation. This right is usually enforced by

mandamus. A stockholder's statutory right to examine the books and records of a corporation is absolute, except that it shall not be exercised from idle curiosity or for improper or unlawful purposes. Their custodian cannot question the motives and purposes of the stockholder in making the examination, and, if the right of examination is refused on the ground that its object is improper, the custodian must assume the burden of proving it to be so: *Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240; *Elsworth v. Dorwart*, 95 Iowa, 108, 58 Am. St. Rep. 427; *Legendre v. New Orleans etc. Assn.*, 45 La. Ann. 669, 40 Am. St. Rep. 243.

CORPORATIONS.—A STOCKHOLDER'S RIGHT TO MAKE ABSTRACTS and memoranda of documents, books, and papers is as full and complete as is his right to an inspection thereof: *Swift v. Richardson*, 7 Houst. 838, 40 Am. St. Rep. 127.

ANDRES v. MORGAN.

[62 Ohio State, 236.]

CORPORATIONS—CHANGE OF PARTNERSHIPS INTO —EFFECT OF, UPON DEBTS.—If, for the purpose of continuing a business, it is changed from a partnership to a corporation, the latter taking all the property of the partnership, by the members of the firm transferring their respective interests therein to the corporation, and receiving a like interest in the capital stock of the company in consideration of the transfer, and the parties remain the same, the debts of the firm become the debts of the corporation, which is answerable therefor, whether it has expressly assumed them or not. Such a transaction is not a sale of property by one to another. The corporation cannot retain the property and repudiate the liability.

DEBTOR AND CREDITOR—CHANGE OF PARTNERSHIP INTO CORPORATION—NOVATION—WHAT IS NOT.—If the members of a partnership contemplate changing the business into a corporation, for the purpose of continuing it, without a change of parties, and a member of the firm assumes one of its debts to a creditor in discharge of a debt of his own to the company, the transaction does not constitute a novation as to the firm creditor, where he had no knowledge of it and never assented to it, and does not in any way affect his rights as a creditor of the corporation. As between such member and the corporation, it is the debt of the former, but as between the firm creditor and the corporation, it is the debt of the latter.

CORPORATIONS—CHANGE OF PARTNERSHIPS INTO—CHANGE OF STOCKHOLDERS—RIGHTS OF CREDITORS.—The rights of a creditor of a partnership, when it becomes a corporation, cannot be altered by subsequent changes in the stockholders. The latter may wholly change and the company remain the same as to rights and liabilities.

EVERY CORPORATION HAS POWER TO MAKE A NOTE to secure the payment of its own debt.

Suit brought by the plaintiff, Andres, against the defendant, Morgan, assignee of the Franklin Milling Company, an insolvent

corporation, to compel the allowance of a claim held by him against the company. This claim was evidenced by a promissory note, made January 1, 1896, and bearing the signatures of Rufus Peters, and the "Franklin Milling Company," per J. A. Long. This note was presented to the assignee and rejected. The gist of the answer was that it was the note of Peters, that the name of the company was signed thereto by Long, who was its general manager, without authority, and that, as to the company, there was no consideration for the note. There was a judgment for the plaintiff in the common pleas and the assignee appealed. For many years prior to April 9, 1889, a partnership, known as the "Franklin Mill Company," existed, but on that date a corporation composed of the members of the partnership was organized under the name of the "Franklin Milling Company." After the corporation was formed M. L. Sternberger, who was not a member of the partnership, subscribed for stock, but there was no finding that he ever paid for it; and, at the time of such formation, or shortly afterward, one Evans, who was not a member of the partnership, purchased a portion of the stock of a shareholder, Rufus Peters, but had not paid for it at the time of the assignment. The plaintiff was one of the creditors of the company at the time of its "reorganization." A short time before the formation of the corporation an assessment was levied, to be applied upon the company's indebtedness, but Rufus Peters was unable to pay, and he assumed the payment of the plaintiff's debt, as stated in the opinion. Sutherland was president of the corporation for a portion of the time that the renewals of the indebtedness to the plaintiff were being made, and was the financial agent and manager thereof at all times until March, 1896. The renewals were made by Long, as secretary of the corporation, at the request and order of Sutherland, down to and including the note in suit; but the officers or agents of the corporation were not authorized by any resolution of its board of directors or by-laws thereof to sign commercial paper of any kind or character. The circuit court concluded that the corporation had no authority to sign the note; that its signing, as stated, was "ultra vires," and that the note was not the liability of the corporation. The plaintiff brought error.

J. M. McGillivray, for the plaintiff in error.

T. A. Jones, for the defendant in error.

²⁴³ MINSHALL, J. The facts disclose that the corporation was formed by the incorporation of the members comprising a partnership. The change was from a partnership to a corporation. The latter took all the property of the partnership. This was accomplished by the members of the firm on the formation of the corporation, transferring their respective interests in the partnership to it, and receiving a like interest in the capital stock of the company in consideration of the transfer. The members of the partnership may be said to have simply put on a new coat. The stock seems to have been divided into interests or shares of one-eighth, the members of the partnership having seven-eighths and holding one-eighth in common; or, which is more to the purpose, each one-eighth held by the former members of the firm represented, in the capital of the company, one-eighth plus one fifty-sixth of the capital stock, since ²⁴⁴ the capital was all owned by those who formed the partnership. On this state of case it is very clear that the corporation was liable for this debt whether it had expressly assumed the indebtedness of the partnership or not. It is not to be regarded as an ordinary sale of property by one to another. A partnership is a quasi legal entity. It owns property and has liabilities as such. Its creditors have a right to the payment of their claims from the partnership assets in preference to individual creditors, and have in equity a lien on the assets of the firm that may be worked out through the partners. So that when the partners transferred all the property of the firm to the company the partnership was dissolved and the rights of its creditors followed the partners and the property into the corporation, and it was bound to discharge the debts of the partnership, having received the property of the partnership on which it had obtained credit. It could not retain the property and repudiate the liability.

All that the corporation paid for the property transferred to it was the stock issued in exchange—simply a metamorphosis of a partnership into a corporation, without any change of individuals, and unless it assumed the payment of the debts of the firm there was no consideration for the transfer of the property—for the stock without the property represented nothing and was worth nothing. That a corporation could be formed and with its capital purchase a partnership and its business without being liable for its debts unless expressly assumed is not doubted; but this is not such a case. This is like the case of Reed Brothers Co. v. First Nat. Bank, 46 Neb. 168, where a partnership en-

gaged in a general mercantile business, in straitened and failing circumstances, incorporated, and the assets and business of the partnership were transferred to the corporation and appropriated to its object and purpose, the business of the partnership being continued by ²⁴⁵ the corporation, it was held that the corporation was presumptively liable for the partnership debts: See 2 Cook on Stock and Stockholders, sec. 669, note 3; Morawetz on Corporations, secs. 791, 812; Broughton v. Pensacola, 93 U. S. 266-270; Beach on Private Corporations, sec. 360.

There was in fact no purchase in this case; it, as shown, was simply a change from doing business in one capacity to that of another—the same persons changed from partners to corporators—and this distinction reconciles many cases on the subject that might otherwise seem in conflict. Where there is a purchase in fact by a new company from an old one there is, as before observed, no liability of the new for the debts of the old company unless assumed as a part of the consideration. But where a mere transformation is had, parties remaining the same, and the property is transferred by the members of the old company transferring their interest in it for an equal interest in it as property of the new, the transaction does not constitute a sale by the one and a purchase by the other; it is simply a change in the manner and form of carrying on the same business by the same persons; and brushing aside the fiction of a legal entity, it is seen that no real change has taken place, and that in looking to the new formation for payment the creditor looks to the same persons, possessed of the same property and rights, he contracted with in the first instance; and to construe the transaction as to creditors as a purchase tends to operate a fraud on their rights. Every purchase implies two distinct persons—a buyer and seller. It is a moral impossibility for one person to buy of or sell to himself. Modern decisions, as observed by Mr. Taylor (Taylor on Private Corporations, sec. 51), are tending to a disregard of the mental conception that a corporation is an entity separate from its corporators, as in many instances it is simply a “stumbling block” in the way of doing justice between real persons.

²⁴⁶ But again, the facts found show that the assumption of the debts of the partnership was a part of the understanding and agreement by which the company was formed. The finding is that at the date of the “reorganization” the partnership conveyed all its property, real and personal, to the corporation, and

that it was formed for the purpose of continuing the business in which the partners had been engaged, and "that the liabilities of the partnership were treated by the corporation as debts of the corporation, and in renewing the partnership liabilities the corporation treated them in the same way as liabilities of the corporation made after the incorporation; and that the transactions of Sutherland with the plaintiff in causing the notes to be renewed were well known to all the stockholders of the corporation save M. L. Sternberger," whose relation to the corporation will be hereafter noticed. These facts are only consistent with an express understanding that the debts of the partnership were to be assumed and paid by the company. It will help in understanding the transaction to note the fact that the same persons who formed the partnership were the incorporators of the company; there were not two real parties in existence dealing with each other. It was conducted by one set of persons, managing a business for their own profit and convenience, and what more natural in such case than in passing from a partnership to a corporation they should determine to carry with them their liabilities as well as their property? Nothing could be gained to them by not doing so, and it would be much to their convenience to do so. And it seems that this is not disputed as to their creditors in general, but certain facts are found which are supposed to vary this obligation as to the claim of the plaintiff. It is found that at the time of the "reorganization" the firm owed some twenty thousand dollars, and that a short time before the members made an assessment on themselves of one thousand dollars to ²⁴⁷ each one-eighth interest, amounting to seven thousand dollars, one-eighth not being assessed, the balance of the indebtedness to be carried by the company. At the time of the assessment Rufus Peters, owner of a fourth interest, was assessed two thousand dollars. Not being able to pay he assumed the payment of the debt to the plaintiff, then two thousand dollars. It is claimed that this amounted to a novation. But the plaintiff was not consulted, knew nothing of the arrangement, could not have assented, and did not, and therefore there was no novation as to him. His rights remained unaffected. Under this agreement payments were made and renewals given from time to time, when the amount was reduced to the sum for which the note in suit was given, the renewals having been signed as the note in suit except during the time Sternberger was a

subscriber to stock. When these payments were made by the corporation it immediately charged them to Peters and took credit to itself on his account for salary. This was a very clear recognition by the corporation that it regarded the debt as its own so far as the plaintiff was concerned. It made the payments and took credit to itself in its account with Peters. This was according to the agreement between it and Peters, but the plaintiff was no party to it and did not know of it. As between Peters and the corporation it was the debt of the former, but as between the plaintiff and the corporation it was the debt of the latter.

Again, the fact is found that one Sternberger, after the company was formed, subscribed for an eighth interest in the capital stock of the company at five thousand dollars. This, we suppose, was the one-eighth the company owned and had not been disposed of. It amounted to no more than an effort to increase the stock to that extent—one-eighth was added in the way of what is commonly called water. This, however, amounted to nothing, as in about a year afterward he surrendered the stock. There is no finding ²⁴⁸ that he ever paid for it; the finding is that he subscribed for it. We assume that if the evidence had warranted such a finding it would have been made; the rule being that when a finding is requested it contains all the facts that the evidence warranted. It is also found that one Evans purchased of Peters a portion of his stock, agreeing to pay five hundred dollars for it; but the finding is that he had not paid for it at the time of the assignment. We do not see how any of these findings can in any way affect the right of the plaintiff to be regarded as a creditor of the corporation. The fact remains that the persons who composed the partnership constituted the stockholders of the company from its organization to the assignment. But suppose it were true that Sternberger became and remained a stockholder of the company, and that Evans acquired and paid for a portion of the stock of Peters, how would this vary the rights of the plaintiff? His rights accrued when the partnership became a corporation, and cannot be changed by subsequent changes in the stockholders. His rights avail against the company and not the stockholders. The latter may wholly change and the company remain the same as to rights and liabilities.

But it is argued that the act of Long in signing the company's name was *ultra vires*. The doctrine has no application to this

case. We have shown that the debt was the debt of the company; it received all the property of the plaintiff and was morally and legally bound to pay it. Every corporation has power to make a note to secure the payment of its own debt.

Judgment reversed.

CORPORATIONS—DEBTS OF PRECEDING PARTNERSHIP—LIABILITY FOR.—That a corporation cannot be sued for the debts of a firm out of which it has been organized, even though there is no difference in membership, see the monographic note to *Austin v. Tecumseh Nat. Bank*, 59 Am. St. Rep. 547, showing when a corporation becomes liable for the debts of a preceding corporation or partnership.

DEBTOR AND CREDITOR—NOVATION.—To constitute the contract of novation, in the essential point of the extinguishment of the original obligation, there must be shown the consent of both the contracting parties. The mere intention of the obligor that the pre-existing debt shall be discharged does not suffice. The creditor must concur in this: *Studebaker etc. Mfg. Co. v. Endom*, 51 La. Ann. 1263, 72 Am. St. Rep. 489.

CORPORATIONS.—A CHANGE IN THE NAME OF, does not relieve from liability for debts previously contracted: Note to *Austin v. Tecumseh Nat. Bank*, 59 Am. St. Rep. 549.

CORPORATIONS—POWER TO MAKE NOTES.—A corporation has implied authority, within the sphere of its prescribed business, to bind itself by a promissory note: *Commercial Bank v. Newport Mfg. Co.*, 1 B. Mon. 18, 35 Am. Dec. 171. Compare *Merchants' Nat. Bank v. Citizens' Gas Light Co.*, 159 Mass. 505, 38 Am. St. Rep. 453.

BOARD OF COMMISSIONERS OF CHAMPAIGN COUNTY v. CHURCH. CALDWELL v. BOARD OF COMMISSIONERS OF CUYAHOGA COUNTY.

[62 Ohio State, 318.]

CONSTITUTIONAL LAW—STATUTE FOR SUPPRESSION OF MOB VIOLENCE—VALIDITY OF.—A legislature is authorized, under its general police power, the general taxing power, and its power to prescribe local taxation for commissioners of counties, to pass an act "for the suppression of mob violence," authorizing the recovery of a fixed penalty against the county in which a lynching takes place, and an order to be made on the county commissioners to include the same in the next succeeding tax levy. Such legislation, not being an exercise of judicial power, nor in contravention of the right of private property, or of the right of trial by jury, is constitutional, though the money is turned over to those who suffer by the act of lynching.

CONSTITUTIONAL LAW—INDIVIDUAL RIGHTS.—Even a criminal has some rights which cannot be forfeited. Every person accused of crime is guaranteed a fair trial. He cannot be deprived of life or liberty without due process of law, and it is the

duty, primarily, of local authorities to make good the constitutional guaranties to the individual, but if a large number of the people of any county become imbued with the lynching spirit, the state must intervene to protect him.

INSTRUCTIONS IN ACTION FOR INJURY BY MOB—WHEN ERRONEOUS.—In an action to recover a statutory penalty for the death of a person caused by lynching, it is erroneous to instruct the jury, in substance, that, if the collection of persons who lynched the deceased had assembled without any unlawful purpose, and afterward committed the acts of violence resulting in his death, the plaintiff cannot recover, and that the verdict should be for the defendant, for the persons of an assembly, though lawfully assembled, may unite in unlawful conduct and thus become rioters.

PLEADING IN ACTION FOR STATUTORY PENALTY—PETITION—SUFFICIENCY OF—MOB VIOLENCE.—In an action to recover a statutory penalty for an injury received at the hands of a mob, the petition is sufficient where it clearly alleges that the plaintiff and his fellow workmen were assaulted by a collection of individuals, who had assembled for an unlawful purpose, and tried "to exercise correctional power" over the plaintiff and his fellows, without any authority of law, and that thus and thereby the plaintiff suffered a lynching at the hands of such mob, although it contains averments that the plaintiff was struck by "a heavy glass insulator, thrown at him by one of the mob," and was "shot through the leg with a leaden bullet, fired from a revolver in the hands of some of the mob," as such details are not inconsistent with the more general averments contained therein.

Church, as the administrator of Charles W. Mitchell, deceased, filed a petition against the board of commissioners of Champaign county, under the statute referred to in the opinion, to recover five thousand dollars for the lynching of Mitchell, at Urbana, in that county. That statute defines a "mob" as any collection of individuals assembled for any unlawful purpose, intending to do damage to anyone, or pretending "to exercise correctional power over other persons by violence, and without authority of law"; and a "lynching," as any act of violence exercised by them upon the body of any person. It authorizes a recovery by the victim of a mob, against the county in which such lynching may occur, the sum of one thousand dollars in case of serious injury, or a recovery of five thousand dollars by the legal representatives of the victim if the injury results in death. The lynching mentioned resulted in Mitchell's death. A demurrer interposed by the defendant was sustained by the court of common pleas and the petition was dismissed. This judgment was reversed by the circuit court and the defendant answered, setting up a general denial and alleging as a second defense that the act was unconstitutional. A demurrer to the second defense was sustained. There was a verdict for the defendant and on petition in error the circuit

court reversed the judgment of the court of common pleas for error in the charge of the court. Caldwell brought an action, under the same statute, against the board of commissioners of Cuyahoga county to recover the sum of one thousand dollars for an injury alleged to have been received at the hands of a mob in that county. The defendant demurred on the ground that the petition did not state facts sufficient to constitute a cause of action, and that the act named was unconstitutional. The court of common pleas sustained the demurrer and its judgment was affirmed by the circuit court. Both cases came up on petitions in error to reverse the respective judgments of the circuit court.

T. J. Frank, E. P. Middleton, and S. S. Deaton, for the board of commissioners of Champaign county, for the plaintiff in error.

Charles H. Bosler and George M. Eichelberger, for Church, the defendant in error.

Willis Vickery, for Caldwell, the plaintiff in error.

P. H. Kaiser, county solicitor, and T. L. Taft, assistant county solicitor, for the board of commissioners of Cuyahoga county, the defendant in error.

§43 DAVIS, J. These cases require a decision of the question whether "An act for the suppression of mob violence," passed April 10, 1896 (92 Ohio Laws, 136), is constitutional.

It is argued that the provisions of this statute contravene article 1 of the fourteenth amendment to the constitution of the United States and are also repugnant to the constitution of Ohio, because they violate the right of trial by jury, because they authorize the taking of property without due process of law, because they are a violation of private rights of property, because they are an exercise of judicial functions by the legislature, and because the object ^{§44} and purposes of the statute are not within the taxing power.

In the ardor of attack it seems to have been overlooked that the constitution extends its protection over individuals as well as counties and municipal corporations. Even a criminal has some rights which cannot be forfeited. Every person who is accused of crime is guaranteed a fair trial, and he cannot be deprived of life or liberty without due process of law. The faith of the body politic is pledged to make good the constitu-

tional guaranties to the individual. To the counties and municipal corporations are delegated in large measure the duties of local administration. Within their jurisdiction they stand in the place of the state in enforcing the laws and in protecting the life, the liberty, and the property of the citizen. If a large number of the people of any county become imbued with the lynching spirit, or negligent and indifferent to the due and orderly enforcement of the laws, so that lawless men may act with impunity, then there is no course for the state to take other than to intervene and directly protect the individual, as well as to enforce upon the community the observance of good order.

The power of the state to do this cannot well be questioned. What is known as the police power is based on the public safety, the public health and morals, and the general welfare, and it is, therefore, as broad as these conditions may require. In this respect, as in other respects, the power of the legislative branch of the state government is plenary, except as it may be specifically and clearly limited in the constitution. Within these limitations the legislature may prescribe such laws, sanctioned by fines, penalties, forfeitures, or damages, as will enforce the observance of the peace and dignity of the state and compensate the injured party; for unfortunately the ³⁴⁵ public conscience is oftentimes more easily quickened in this way than by teaching and persuasion.

Now, as to the alleged violation of the right of trial by jury, it may well be doubted whether counties and municipalities have any such absolute right of trial by jury that they may complain of its infringement by the legislature. They are creatures of constitutional and legislative enactment. They have only such powers and privileges as are given them, and these powers and privileges may, in general, be modified or taken away.

But cases like these need not be disposed of on that ground. The contention is that the statute deprives the defendant of the right to have the amount to be paid assessed by a jury as damages. A county or municipality can no more complain of this statute as an infringement upon the right of trial by jury, than the man who has been tried by a jury and found guilty of a crime can complain that the law under which he is tried does not provide that the jury shall assess the amount of his fine or adjudge the extent of his imprisonment. The primary,

purpose of the legislature was punishment and correction. The expressed object of the law is "the suppression of mob violence." That the legislature might, in the exercise of the police power, fix the amount of a penalty without the intervention of a jury was long ago decided by this court in Cincinnati etc. R. R. Co. v. Cook, 37 Ohio St. 265. And this being so, it is of no concern to the party paying the penalty to whom the state in its sovereignty may pay it. It may well, as under this statute, turn the money over to those who suffer by the act of lynching. In this respect it makes no difference whether in the statute it be called penalty or compensation or damages. Nor does it alter the case that the amount is fixed—that is, determined by the statute, as in this case—or that it is to be found by a jury. Nor yet does it ³⁴⁶ matter that it is declared to be "for the suppression of mob violence," as in this case, or "for compensating parties whose property may be destroyed in consequence of mobs or riots," as in the statute which was upheld in Darlington v. Mayor etc., 31 N. Y. 187, 88 Am. Dec. 248, because the imposition of any amount by authority of the state is, in either case, essentially penal and corrective in its nature. The party paying the money so recovered—that is, as a penalty—has no right to complain that the sovereign pays it over to the person injured, or pays it for the benefit of the minor children of a person suffering death by lynching or to the next of kin of such person; nor that the sovereign provides that "such recovery shall not be regarded as a part of the estate of the person lynched, nor be subject to any of his liabilities." Nor is it a matter which can be put in issue for trial by jury; for the legislature does not authorize nor attempt a compensation of the injury according to the measure of the injury to be settled on an inquiry of damages.

We have dwelt on this phase of the law more than we have thought necessary, because it is the source of the main contention in these cases. We shall very briefly advert to the remaining questions presented for our consideration.

In the nature of things the limitations of the taxing power are not ordinarily nor necessarily limitations on the police power; but the matter is set at rest for the cases at bar by the constitution itself, which provides as follows: "The commissioners of counties, the trustees of townships, and of other similar boards, shall have such power of local taxation for police purposes as may be prescribed by law": Const., art. 10, sec. 7. This court held in Sessions v. Crunkilton, 20 Ohio St. 349,

358, that when local taxation is exercised for purposes which are demanded by, or are conducive to, public ³⁴⁷ health, convenience, or welfare, it is within the constitutional meaning of "police purposes."

From what has been said it will appear that this statute does not authorize nor attempt the taking of private property for a private use, nor even the taking of private property for a public use in the exercise of the right of eminent domain. It authorizes the recovery of a penalty against the county, and authorizes an order to be made on the commissioners of the county, to include the same in the next succeeding tax levy. This, as we have seen, the legislature has power to enact under the general police power, the general taxing power, and section 7 of article 10 of the constitution. Hence, section 19 of article 1 of the constitution does not apply.

Again, this legislation is not an exercise of judicial power, because it does not adjudicate any transaction, case, or controversy which arose before its enactment, and of which the judicial tribunals might have been cognizant. It provides what shall be the law, binding upon the judicial department, after its enactment, and is not in any sense a trespass upon the province of the courts.

Having disposed of the foregoing objections to the statute, we assume that the contention that it provides for the taking of property without due process of law is already sufficiently answered. Many other questions have been raised and discussed. They are all such as might well have been addressed to the legislature, but they cannot be considered here. We conclude that the act is constitutional.

On the trial of the case of Church v. Commissioners of Champaign County, in the common pleas court, the court charged the jury in substance that if the collection of persons who lynched Mitchell had assembled without any unlawful purpose, and afterward committed the acts of violence which resulted in the death of Mitchell, the plaintiff ³⁴⁸ could not recover and the verdict should be for the defendant.

The court afterward made an explanation of this instruction; but the explanation did not explain, especially since the court instructed the jury that such unlawful purpose or design may be formed either before or at the time of assembling, "or it may be formed with the agreement of mutual assistance after they have assembled," and that "no formal or express agreement need be proved to establish such unlawful purpose, but it may,

be inferred from all the facts and circumstances proved in the case and its existence and the time of its formation are questions of fact for the jury." And the court not only refused to instruct the jury, as requested by the plaintiff, that the fact that Mitchell was lynched was evidence that the individuals who lynched him intended to lynch him, but, instead, the court charged the jury that the lynching of Mitchell might be considered as evidence of the unlawful intent, and also charged that such lynching did not raise a presumption of law that they assembled with that intent. The charge, when all taken together, seems very plainly to have told the jury that if the crowd came together with an innocent purpose, and afterward lynched Mitchell, they would not be a mob unless they had specifically agreed to be a mob after they had assembled. This charge is not merely seriously misleading, it is erroneous. It is an ancient doctrine in the criminal law, as old as Hale's Pleas of the Crown, at least, that although the assembly was lawful, the persons assembled might unite in unlawful conduct and thus become rioters.

In *Caldwell v. Commissioners of Cuyahoga County* a demurrer to the petition was sustained in the court of common pleas, and the petition was dismissed. This judgment was affirmed by the circuit court. Besides the constitutional objections which we have already considered, the counsel for the commissioners ⁸⁴⁹ urge that the petition is defective, because the plaintiff therein avers that he was struck by "a heavy glass insulator thrown at him by one of the mob," and was "shot through the leg with a leaden bullet, fired from a revolver in the hands of some of the mob." It is argued that as the shooting was done by a pistol in the hands of one person, and as the glass insulator was thrown by one person, it does not appear that the specific acts which occasioned the plaintiff's injuries were the acts of a "collection of individuals" or a "mob."

We do not think that there is much force in this argument. It is clearly alleged in the petition that the plaintiff and his fellow workmen were assaulted by a collection of individuals, who had assembled for an unlawful purpose, and tried to exercise correctional power over the plaintiff and his fellows, without any authority of law, and that thus and thereby the plaintiff suffered a lynching at the hands of said mob.

The petition contains a sufficient statement of a cause of action against the county under the statute in question, and the

details which are set forth in the petition are not inconsistent with the more general averments contained therein. The demurrer should have been overruled. We have carefully considered all of the arguments and authorities which counsel have submitted, and we are thoroughly satisfied with the foregoing conclusions.

In *Board of Commissioners of Champaign County v. Church, Administrator of Mitchell*, the judgment of the circuit court is affirmed.

In *Caldwell v. Board of Commissioners of Cuyahoga County* the judgment of the circuit court and the judgment of the court of common pleas are reversed.

INJURY TO PROPERTY BY MOBS—LIABILITY FOR—CONSTITUTIONALITY OF STATUTES CREATING.—An act subjecting counties and cities to liability for injuries to property by mobs and riots within such counties and cities is within the general scope of legislative authority, and is not obnoxious to the constitutional provision that no one shall be deprived of his property without due process of law: *Darlington v. Mayor*, 81 N. Y. 164, 88 Am. Dec. 248, and extended note thereto discussing the subject. See, also, *Chicago v. Manhattan Cement Co.*, 178 Ill. 372, 69 Am. St. Rep. 321, to the same effect. Statutes allowing damages for a lynching are of recent origin.

DAVIS v. DAVIS.

[62 Ohio State, 411.]

WILLS—RESIDUARY CLAUSE—CONSTRUCTION OF—INTENTION OF TESTATOR.—In Ohio, there is no distinction made between the effect of a residuary clause in a will with respect to void and lapsed devises of realty and such bequests of personalty, because, in that state, both real and personal property, of which no disposition is made by will, go to the next of kin. Hence, in all cases, the intention of the testator must control, which is to be ascertained from his situation at the time of the execution of the will and from a consideration of all of its provisions.

WILLS—RESIDUARY CLAUSE—CONSTRUCTION OF—VOID AND LAPSED LEGACIES.—There can be no proper application of the rule that a residuary clause carries all the estate of the testator not otherwise lawfully disposed of by the will, including void and lapsed legacies, when a different intention may be fairly drawn from all the provisions of the will.

WILLS—RESIDUARY CLAUSE—HOW CONSTRUED, IF IT HAS TWO APPLICATIONS.—If the language of a testator, in the residuary clause of his will, admits of a limited application, as well as one of a more general character, it should be given that construction most favorable to the heir at law.

WILLS—RESIDUARY CLAUSE—VOID CHARITABLE REQUESTS ARE SUBJECT TO STATUTES OF DESCENT.—When the residuary clause of a will, which does not purport to dispose of the general residuum of the testator's property, provides that "the balance" of a particular fund, derived from certain specified sources, shall, after the payment of debts, and certain charitable legacies, which have become void from the happening of an unexpected event, be divided among persons named, that "balance" is only what is left after taking from the fund the amount of the charitable bequests. Hence, the amount of the charitable legacies does not pass under the residuary clause, but goes to the heirs, under the statutes of descent and distribution, as undisposed of property.

WILLS—CHARITABLE REQUESTS OR DEVISES—STATUTE INVALIDATING—OBJECT AND EFFECT OF.—A statute which invalidates a legacy or devise to any benevolent, religious, educational, or charitable purpose, where the testator dies, leaving children or an adopted child, unless the will was executed, according to law, at least one year prior to the decease of the testator, is designed for the special protection of the children or adopted child of the testator and their representatives, though it inures also to the benefit of the collateral heir when the lineal heir survives the testator and then dies.

Action brought in the common pleas by Joseph Davis, executor of the will of William Hutchings, to obtain a construction of the will and directions for the disposition of the estate. All persons in interest, including the plaintiff in error, Isolina Davis, an adopted child of the testator and his sole heir at law, were made parties. The case was appealed to the circuit court, which rendered a judgment adverse to the heir, who brought error.

Jones & Anderson, for the plaintiff in error.

E. P. Wilmot, for the executor.

412 WILLIAMS, J. William Hutchings executed the will in question on the twenty-fourth day of November, 1893, and died in Cuyahoga county, where he had theretofore resided, on the twelfth day of September, 1894. The will was admitted to probate in that county on the twenty-second day of September, 1894, and the executor named therein duly qualified. The testator left neither widow nor lineal descendant, but the plaintiff in error, who had been duly adopted as his child in accordance with the laws of this state, survived him as his sole heir at law. By the will certain pecuniary legacies are given to collateral relatives of his deceased wife and of his own and to his adopted child, and to some other persons, which are not deemed important in arriving at a construction of the will. The following are the material provisions of the will:

"CHARITABLE PURPOSES.

"1. I give \$1,000.00 one thousand dollars for a county poor house when ever built or bought. Until then, safely invest the money and give the annual proceeds to the deserving poor of Chagrin Falls, who do not regularly receive help of the town.

"2. I give \$1,000.00 one thousand dollars toward either the purchase or building of a Congregational ⁴¹³ church parsonage in Chagrin Falls if the trustees so provide.

"3. I give \$500.00 five hundred dollars to the Bible Christian Conference in England for their China Mission.

"My will is also that my live stock and farming utensils of every kind be sold within six months of my death. The Enterprise mill, my interest in the business of Stoneman and Hutchins, with what of real estate is not sold of any and all kinds, shall be disposed of and business settled up if possible within (2) two years of my death. And further, the proceeds arising therefrom, with all from any and all sources due to me from mortgage, bank or bills unpaid at my death, be used in paying all before specified as my indebtedness and to my legatees, and the charities. And the balance be divided between the children living at my death of the hereinafter named brothers and sisters of my late wife and myself, viz.: Robert Hutchins, Phillip Hutchins, (2 daughters) William Down, Mary Montjoy, Grace Isaacs, my late sister Elizabeth Noakes, and Catherine Isaacs. P. S. Henry Noakes had 100 dollars deduct and properly divide with others."

The testator having died within one year after the execution of the will leaving an adopted child surviving him, the three charitable bequests, amounting to two thousand five hundred dollars, were rendered void by the operation of section 5915 of the Revised Statutes, which provides that: "If any testator die leaving issue of his body, or an adopted child, living, or the legal representative of either, and the will of such testator give, devise, or bequeath the estate of such testator, or any part thereof, to any benevolent, religious, educational, or charitable purpose or to any person in trust for any such purposes, whether such trust appears on the face of the instrument making such gift, devise, or bequest or not, such will as to such gift, devise, or bequest ⁴¹⁴ shall be invalid unless such will shall have been executed according to law at least one year prior to the decease of such testator."

The fund derived from the sources named in the provisions of the will immediately following the three charitable bequests,

and out of which the testator directed them to be paid, exceeds their aggregate amount after the payment of the testator's debts and the satisfaction of all other charges upon the fund, leaving a balance to pass under that clause of the will to the children of the brothers and sisters of the testator and of his late wife as therein provided. And the question involved in the construction of the will upon which the executor has sought the judgment and direction of the court is whether the amount of the void legacies fell into the balance above mentioned, or passed as undisposed of property to the adopted child. The circuit court held the amount of those legacies became part of the balance referred to, and directed distribution thereof accordingly, upon the ground that the language disposing of that balance constitutes a residuary clause that includes all of the residuum of the testator's estate not otherwise effectually disposed of by the will. This conclusion seems at variance with the language of the will and the apparent intention of the testator. The "balance" that is given to the so-called residuary legatees is not the general residuum of all of the testator's estate, but only what remained of a particular fund derived from specified sources, after deducting therefrom the amount of the charitable legacies and certain other charges upon it. The gift of that balance necessarily excludes from the gift everything that the will provides shall be deducted from the fund in order to arrive at the balance. The testator when he made his will evidently expected the bequests to the charities to be valid, and intended the money to be applied to them as provided in the will, otherwise he would not have made such bequests. ⁴¹⁵ That he did not expect those bequests to become void by his death within a year from the execution of the will is apparent from the fact that he made no provision for the disposition of the money in that event. And though the bequests became ineffectual to carry the fund to the expressed objects of the testator's bounty, it seems obvious his intention was to limit the gift under the so-called residuary clause to whatever balance should remain after they and other charges were taken out of the fund from which they were directed to be paid.

There can be no proper application of the rule that a residuary clause carries all the estate of the testator not otherwise lawfully disposed of by the will, including void and lapsed legacies, when a different intention may be fairly drawn from all the provisions of the will. We are aware a distinc-

tion has sometimes been made between the effect of a residuary clause with respect to void and lapsed devises of realty and such bequests of personalty. In regard to the former a rule requiring that construction which is most favorable to the heir has been applied, and in the latter one which is most favorable to the residuary legatee. The reason of this distinction is stated by Sir John Leach, master of the rolls, in *Jones v. Mitchell*, 1 Sim. & St. 290, 295, to be "that the will as to the personal estate speaks at the time of the death of the testator, and the residuary legatee takes not only what is undisposed of by the expressions of the will, but what becomes undisposed of at the death by disappointment of the intention of the will," while, as to real estate, "the will speaks only at the time of making it," and the residuary legatee can take "nothing but what at that time was intended for him." This is not a very satisfactory reason, since in all cases the intention of the testator must control, and that is to be ascertained in the light of his situation at the time of the execution of the will and from a consideration of all of its ⁴¹⁶ provisions. It is more probable, as stated in *Perry v. Barber*, 1 Hill Eq. 95, that the distinction grew out of the English law under which personal property not disposed of by the will went to the executor, though not of kin to the testator, and to avoid that result the courts went "very far to favor the residuary legatee, and often strained a point to include such property in the residuum under the will; but as undisposed of realty went to the heir the courts applied a more reasonable rule in upholding his rights, and gave him the property included in devises that failed, unless an intention to make a different disposition was shown by the will." Some American courts have followed the English decisions: *Greene v. Dennis*, 6 Conn. 293, 16 Am. Dec. 58; *Van Kleek v. Church*, 20 Wend. 471; *Riker v. Cornwell*, 113 N. Y. 115. The reason for the discrimination in favor of residuary legatees in cases of void legacies has never existed in this state, where the next of kin takes under the law both real and personal property of which no disposition is made by will. The courts which maintain that discrimination, however, hold the rule to be applicable only where there is a general residuary clause in the will embracing all of the otherwise undisposed of property of the testator. In every case that has been brought to our attention where that rule has been applied the will involved contained a residuary clause of that character. In *King v. Woodhull*, 3 Edw. Ch. 79, 82, it laid down that "to entitle a

residuary legatee to the benefit of a lapsed or void bequest he must be a legatee of the residue generally, and not partially so; for where it is manifest from the express words of the will that a gift of the residue is confined to the residue of a particular fund or description of property, or to some certain residuum, he will be restricted to what is thus particularly given, since the legatee cannot take more than is fairly within the scope of the gift." In *Kerr v. Dougherty*, 79 N. Y. 329, it was held that: "The general rule that in a will of personal property a general residuary clause carries whatever is not otherwise legally disposed of does not apply to a residuary clause limited by its terms to what remains after payment of specific legacies; in such case if any of the legacies are void there is another residuum which is undisposed of." The authorities are largely reviewed in that case, and its principle has been approved in the later decisions in that state. The same doctrine is maintained in *Peay v. Barber*, 1 Hill Eq. 95, where there is also a general discussion of the subject and of the cases bearing upon it. This principle is also declared in *Bane v. Wick*, 19 Ohio, 328, where it was held that: "If the language of the testator in a residuary clause of his will will admit of a limited application, as well as one of a more general character, a court of equity will give it that construction which will be most favorable to the heir at law." The residuary clause in that will is not much dissimilar to that in the one before us. There the testator, after making certain devises and bequests, directed that his executors should retain in their possession all of his bank and canal stock and the lands and town property, the use of which was given to his wife, or as much as should be sufficient to pay all his debts, legacies, and donations, and "the 'balance' to be equally divided among his children then living." A daughter of the testator to whom certain real property was devised by the will died before the testator, and her children brought the suit, claiming as to that and other property the testator died intestate, and that they inherited, in right of their mother, as heirs of the testator, their share of the intestate property. The living children of the testator claimed under the residuary clause of the will. The court held that the words "the balance," in the residuary clause, should be so limited "as to ⁴¹⁸ reach nothing more than the particular fund with which they stood in immediate connection, namely, the bank and canal stock and the lands and town property, the use of which had been given to the wife of the testator." And

that fund, "after being charged with all the debts, legacies, and donations," yielded "the only 'balance' to be distributed" to the residuary legatees.

The residuary clause in the will in question here does not purport to dispose of the general residuum of the testator's property, but is, in terms, limited to the disposition of "the balance" of a particular fund derived from certain specified sources; and that "balance" is only what is left after taking from the fund the amount of the charitable bequests, though from the happening of an unexpected event they became void. The requirement that the amount of those bequests shall be taken from the fund in order to arrive at the balance that shall pass under this clause to the persons named clearly evinces an intention of the testator that no part of that amount shall go to them. What disposition the testator would have made of the amount if he had anticipated the charitable legacies might have failed is left to mere conjecture, and the presumption that he did not intend to die intestate as to any property to which his attention was directed does not authorize the court to dispose of it as may be supposed the testator would have done. In the construction of wills conjecture is not permitted to supply what the testator has failed to indicate; for as the law has provided a definite successor in the absence of disposition, it would be unjust to allow the right of this ascertained object to be superseded by the claim of anyone not pointed out by the testator with equal distinctness": 1 Jarman on Wills, * 326.

If it be a presumption that the testator knew of the provision of the statute already quoted which avoids bequests and devises of the ⁴¹⁹ character therein mentioned on the happening of the specified event, it may be inferred that he intended the amount of such bequests in his will to go to his heir, if they became ineffectual, with as much certainty at least as that he intended it should pass under the gift of the balance of the designated fund after deducting the amount therefrom. The statute evidently was enacted for the special protection of the children or adopted child of the testator and their representatives in the cases provided for, though, as held in *Patton v. Patton*, 39 Ohio St. 596, it inures also to the benefit of the collateral heir when the lineal heir survives the testator and then dies.

We think the fund in question should be awarded to the plaintiff in error.

Judgment reversed and judgment for plaintiff in error.

WILLS—CONSTRUCTION—INTENT MUST CONTROL.—In construing wills, the intention of the testator, when ascertained and not in violation of law, must control: *Wescott v. Binford*, 104 Iowa, 645, 65 Am. St. Rep. 530; *Rose v. Hale*, 185 Ill. 378, 76 Am. St. Rep. 40. The intention of the testator will govern in the disposition of lapsed legacies or devises: *Note to Giddings v. Giddings*, 48 Am. St. Rep. 197.

WILLS—FAILURE OF BEQUEST OR DEVISE.—A GENERAL RESIDUARY CLAUSE in a will must be construed in subordination to the general purpose of the testator as expressed in the will: *Dickison v. Dickison*, 138 Ill. 541, 32 Am. St. Rep. 163. Unexhausted residuum goes to the heir like undisposed of real estate, where lands are devised upon trust for a particular purpose and there is a balance left or the trust fails: *Mahorner v. Hooe*, 9 Smedes & M. 247, 48 Am. Dec. 706. If an estate is given by will to two, and the part given to one fails from any cause, that part, without any express and fresh disposition of it, will not go in augmentation of the part given to the other, but will fall into the residue, or go to the next of kin: *Sturgis v. Work*, 122 Ind. 134, 17 Am. St. Rep. 349.

STATE v. MILLER.

[62 Ohio State, 436.]

MUNICIPAL CORPORATIONS—ELECTION BY CITY COUNCIL, WHEN COMPLETE—RECONSIDERATION OF.—When the vote of a city council for the election of a city clerk has been cast, and the result announced to the council by the clerk, the right of one who has received a plurality of the votes cast to be inducted into the office is fixed eo instanti, without any formal declaration of the result by the mayor as presiding officer of the council. The election is then complete, and members of the council cannot afterward lawfully change the result by changing their votes.

MUNICIPAL CORPORATIONS—MAYOR—DUTY AND POWER OF, IN CITY ELECTIONS.—Under a statute which makes the mayor of a city the presiding officer of the city council, and which does not provide for his participation in a city election except in case of a tie vote, he is not a member of the council and has no duty to perform, as to such election, except in the case of a tie vote. He can take no part therein, unless such contingency arises, and it is, therefore, unnecessary for him to declare the result.

Quo warranto filed in a circuit court by the relator, Calderwood, to oust the defendant, Miller, from the office of city clerk of Greenville, a city of the second class. There was a judgment for the defendant and the petition was dismissed. The relator brought error.

Allread & Teegarden and D. P. Irwin, for the plaintiff in error.

George W. Mannix, Jr., S. V. Hartman, and John C. Clark, for the defendant in error.

⁴⁴⁴ DAVIS, J. The relator's chief contention is that upon the undisputed facts the judgment of the court below should have been in his favor. The undisputed facts, or at least such of them as are necessary for our present purpose, are, that the council numbered eight members; that all of the members were present at the meeting on the seventeenth day of April, 1899; that the mayor presided at that meeting; that an election was then held for the office of city clerk; that four votes were cast for the relator, two votes for the defendant, and two votes for a third person, and that the clerk announced the result of the vote. Thereupon, after some parley, the two members who had voted for the third candidate changed their votes to the defendant, causing a tie, and the mayor then cast his vote for the defendant and declared him to be elected. Whether the mayor did or did not declare the relator elected before the change of votes is a disputed question and not very material. The statute (Rev. Stats., ⁴⁴⁵ sec. 1676) declares that the members of the city council shall elect the clerk and other officers. It is provided that in cities of the second class the mayor, by virtue of his office, shall preside at the organization of the council; but he is not a member of the city council, and it is not provided that he shall participate in the election except in case of a tie vote. That contingency did not arise in this case, unless the two members who changed their votes to the defendant might lawfully do so after a vote had been taken and the result ascertained.

But the vote having been cast and the result having been announced to the council by the clerk, by which it was apparent that the relator had received a plurality of the votes cast, the function of the council was discharged: *State v. Anderson*, 45 Ohio St. 196. The election was complete. The formality of a declaration by the presiding officer of the council could neither add to nor detract from the thing which had already been done. The right of the relator to qualify and to be inducted into the office was fixed *eo instanti*.

The council was engaged in the duty of electing officers, a duty imposed on the members thereof, not on the body as a council. They were not engaged in the deliberative business which is the ordinary work of the council, but in the election of a city officer. They were not acting under parliamentary,

law, but were casting their votes and making their choice as required by a specific statute. They could make this choice but once. Having done so they could not reconsider it. Much less could some of them against the protest of a plurality, under the suggestions or invitations of the presiding officer or *sua sponte*, change their votes. This would give to the minority the power of defeating the choice of a plurality ⁴⁴⁶ which had already been legally made and ascertained: See *Regina v. Donoghue*, 15 U. C. Q. B. 454; *Hopkins v. Swift*, 100 Ky. 14.

The relator was duly elected city clerk and must be inducted into the office.

Judgment reversed and judgment of ouster against defendant.

CITY ELECTIONS.—THE MAYOR HAS NO RIGHT TO VOTE at a city election where there is no tie, and his action in declaring the result, in such a case, cannot make an election: *Lawrence v. Ingersoll*, 88 Tenn. 52, 17 Am. St. Rep. 870.

WICK NATIONAL BANK v. UNION NATIONAL BANK.

[62 Ohio State, 446.]

CORPORATIONS—INSOLVENCY—ASSESSMENTS UPON TRANSFERRING STOCKHOLDERS—HOW TO BE APPLIED AMONG CREDITORS.—If a solvent stockholder of a corporation transfers his shares, in good faith, to one who is insolvent at the time when the stockholders' liability is subjected to the payment of debts, a fund derived from assessments levied upon such transferring shareholders must be applied exclusively to the payment of creditors whose claims existed at the time of such transfer. It cannot go into a common fund to be distributed *pro rata* among all the creditors of the corporation. No part thereof should be applied to debts of the company contracted subsequently to the date of such transfer.

CORPORATIONS—INSOLVENCY—ENFORCING STATUTORY LIABILITY OF TRANSFERRING STOCKHOLDERS—PROPER DISTRIBUTION AMONG CREDITORS.—In a suit to enforce the statutory liability of stockholders of an insolvent corporation, the rule for determining to whom the money shall be paid is, that, as to a fund arising from assessments upon all who are stockholders at the time of the decree enforcing such liability, all the creditors should share *pro rata*; but as to funds arising from assessments upon persons who were stockholders, but who assigned their stock, in good faith, before the insolvency of the corporation, such funds should be applied to the residue, if any, owing to creditors who were such at the time of the assignment of the stock.

Williamson, Cushing & Clarke, C. D. Hine, Webster & Cook, Garfield, Garfield & Howe, and J. J. Sullivan, for the plaintiffs in error.

Hersley & Selzer and Squire, Sanders & Dempsey, for the defendants in error

⁴⁶⁰ SPEAR, J. The case here in error arises out of a controversy in a suit brought by the creditors of the Champion Spring Bed Company, a corporation, against stockholders to enforce stockholders' liability under the statute.

Certain of the existing debts of the corporation were created prior to the transfer of the stock of certain stockholders who sold and transferred their stock to insolvent purchasers, but the bulk of the existing indebtedness accrued afterward, and the controversy below was as to the division of the amount arising from assessments upon those former stockholders. The trial court held that the fund so arising should be applied in payment of the indebtedness existing at the time of the transfer, and that no part thereof should be applied to the debts of the company contracted subsequent to that date. The circuit court affirmed that judgment, and error is brought in the interest of the later creditors. So that the question presented by the record is: ⁴⁶¹ Where a solvent stockholder transfers his shares to one who, at the time of subjecting the stockholders' liability to the payment of debts, is insolvent, shall the fund derived from the assessment upon such transferring stockholders be applied solely to the payment of debts of the corporation existing at the time of such transfer, or shall it be applied pro rata to all debts, regardless of when they were contracted?

Our constitutional provision is: "Dues from corporations shall be secured by such individual liability of the stockholders and other means as may be prescribed by law"; and the statute is: "All stockholders . . . shall be deemed and held liable to an amount equal to their stock subscribed, in addition to said stock, for the purpose of securing the creditors of such company."

It is to be noted that no method or basis of distribution is prescribed, and whether distribution is to be pro rata among creditors or otherwise is left to judicial determination.

It is conceded by plaintiffs in error that no decision of this court covers the proposition. But it is insisted that expressions in cases involving the enforcement of statutory liability, notably, *Umsted v. Buskirk*, 17 Ohio St. 114, *Brown v. Hitchcock*, 36 Ohio St. 667, and *Harpold v. Stobart*, 46 Ohio St. 397, 15 Am. St. Rep. 618, favor the claim of the plaintiffs in error.

That claim is, in substance, that, as stated in *Umsted v. Buskirk*, 17 Ohio St. 114, "the right arising out of this [the stockholders'] liability is intended for the common and equal benefit of all the creditors," and from this it follows that the liability of the stockholders is to secure payment of the debts and liabilities of the corporation—not some of them, but all of them; not ⁴⁶² such as may be contracted at some given period, but, without restriction, all of them.

On the other hand, counsel for defendants in error insist that the creditors who were such at the time the transfer of stock was made are to receive the same pro rata share as other creditors out of the general fund derived from the assessment of all solvent stock outstanding at the time of the insolvency of the corporation, and in addition to receive the extra amounts by reason of assessments on stock outstanding while they alone were creditors, to be applied toward the payment of such parts of their claims as remain unpaid by reason of the insufficiency of the fund raised by the general assessment.

It is not proposed here to discuss these several contentions at length, but to simply state the conclusions to which the court has arrived. For arguments pro and con reference is had to the able briefs of counsel which precede and to the authorities which are there cited.

It is true that the precise question has not been heretofore considered by this court, at least not in any reported case. It is further true, as we think, that excerpts from *Umsted v. Buskirk*, 17 Ohio St. 114, and *Harpold v. Stobart*, 46 Ohio St. 397, 15 Am. St. Rep. 618, to be found in the brief of plaintiffs in error, do not materially aid their contention, for by all rules of construction they must be held to apply to the precise question in hand, which was not this question, no matter of distribution being then before the court. An attentive consideration of those cases will show that when it is stated that the right against stockholders arising out of their statutory liability is intended for the common and equal benefit of all creditors, the context indicates that reference is had to such creditors as are in a position to demand an enforcement of the right, ⁴⁶³ and to them only. As to the expressions quoted from the opinion of McIlvaine, J., in *Brown v. Hitchcock*, 36 Ohio St. 667, it should be remembered that they are dicta of a dissenting judge, and while apparently they seem to have been shared by the others, yet the proposition stated was not argued by the counsel and not involved in the case before them for adjudication. What con-

clusion would have been reached after full argument and under the responsibility of deciding a live question we have no means of determining.

It having been settled by previous decisions that where holders of stock are, at the time action is brought to enforce stockholders' liability, insolvent, the liability of assignors of such stock may be subjected to payment of debts existing at the time of the transfer, we have as a new question a proper rule of distribution of the fund made by assessment upon such former holders of stock, and it is not free from difficulty. Two considerations, however, lead us to the conclusion that the better reason supports the contention of defendants in error, and that the judgments below should be affirmed.

1. Those who were creditors at and prior to the transfer are in law presumed to have trusted to the responsibility of the then stockholders, as well as to the property of the corporation, and the obligation of the stockholder to the creditor is in the nature of a contract, and although not in form an express personal contract, yet is of equally binding force. It springs out of, and is coexistent with, the contract between the corporation and the creditor: *Brown v. Hitchcock*, 36 Ohio St. 667; *Corning v. McCullough*, 1 N. Y. 47, 49 Am. Dec. 287; *Hawthorne v. Calef*, 2 Wall. 10; *Norris v. Wrenschall*, 34 Md. 492; *Hager v. Cleveland*, 36 Md. 476. There arises, therefore, a manifest equity in favor of such creditors.

2. Such transferrers of stock have incurred no statutory liability to the later creditors and owe no contractual duty to them; nor are they in any way liable to them because of once having been the owners of stock. These later creditors can have no standing to demand distribution to them of a fund which arose, not from any contract with them or with anyone for their benefit, nor by reason of any liability accruing in their favor, but from a contract wholly with others and for the benefit of others, and resting upon a liability created wholly in favor of others. Hence, the fund which accrues from assessments upon such assignors of stock can in no sense belong to the subsequent creditors, and they are, therefore, not deprived of any right by the application of such fund to the satisfaction of the debts owing to the earlier creditors.

We are of opinion that the proper rule is that as to the fund arising from assessments upon all who were stockholders at the time of the decree enforcing stockholders' liability all the creditors should share pro rata; but as to funds arising from

assessments upon persons who had been stockholders but had assigned their stock in good faith before the insolvency of the corporation, such funds should be applied to the residue, if any, owing to creditors who were such at the time of the assignment of the stock, the liability of such transferrers of stock being subject to the limitations stated in *Harpold v. Stobart*, 46 Ohio St. 397, 15 Am. St. Rep. 618.

Judgment affirmed.

CORPORATIONS—LIABILITY OF TRANSFERRING STOCK-HOLDERS—EXTENT OF, AND WHEN IT ATTACHES.—A stockholder of a corporation, who has in good faith sold and assigned his stock to one who becomes insolvent, is liable to creditors of the corporation for such portion only of the debts existing while he held the stock, and remaining due (not in excess of the stock assigned), as will be equal to the proportion which the capital stock assigned by him bears to the entire capital stock held by solvent stockholders, liable in respect of the same debts, who are within the jurisdiction, to be determined at the time judgment is rendered: *Harpold v. Stobart*, 46 Ohio St. 397, 15 Am. St. Rep. 618. This liability, however, is a question clearly distinguishable from the one as to how a fund, arising from the enforcement of a stockholder's statutory liability, shall be distributed among creditors prior to the transfer and creditors subsequent to it. Upon the latter question there seems to be a dearth of authority.

LEGER v. WARREN.

[62 Ohio State, 500.]

ARREST WITHOUT WARRANT—RIGHT OF DETENTION—LIMIT UPON.—Statutory authority to arrest a person without a warrant does not authorize his detention in custody for any longer time than is reasonably necessary to procure a legal warrant for his detention.

FALSE IMPRISONMENT—ACTION FOR—ARREST WITHOUT WARRANT.—If a person is arrested without a warrant, and is detained in prison for an unreasonable period of five days or more, without any writ or order of any court, he has a right of action for false imprisonment not only against the officers who arrested him, but against those who unlawfully held him in custody.

FALSE IMPRISONMENT—ACTION FOR—DEFENSE—ARREST WITHOUT WARRANT.—In an action for false imprisonment, based upon an arrest without warrant, and detention for an unreasonable period, without any writ or order of court, it is no defense for the arresting officers that they acted under orders from a superior officer. They become, under such circumstances, wrongdoers from the beginning, and are liable as such equally with those by whom the imprisonment was continued.

Action for damages brought in the common pleas by the defendant in error, Warren, against Leger and three other police

officers of the city of Columbus, for wrongful arrest and imprisonment. The sureties on the official bonds of the officers were also made defendants. Kelly, the chief of police of the city, was one of the defendants. A judgment for the plaintiff was affirmed by the circuit court and the defendants brought error.

C. D. Saviers and David B. Sharp, for the plaintiffs in error.

Kinkead, Merwine & Rhoads, for the defendant in error.

⁵⁰⁶ WILLIAMS, J. The following are the material parts of the court's charge of which the plaintiffs in error complain:

"It was the duty of the defendants, whether they caused the arrest and imprisonment or made the arrest and imprisonment, to carry the plaintiff without unreasonable delay before a magistrate of lawful competency for that purpose, to accuse him there according to the forms of law, and obtain the necessary magisterial sanction for any further detention of him. The defendants making the defense here (I mean all the defendants except the sureties) did not comply with the command of the law, which required them to take him before a magistrate and obtain a warrant for his arrest. They have not shown any lawful reason for omitting to do this. He was detained in prison an unreasonable time without the filing of an affidavit and the procuring of a warrant. Their failure to comply with this law made them trespassers from the beginning of the arrest. The permission which the law gave them to arrest and imprison him originally because there was reasonable cause for it, without first filing an affidavit, and procuring a warrant was given to them on the condition that they would not detain him longer than was reasonably necessary to enable an affidavit to be filed and a warrant to be procured. Not having complied with that condition the fact that he was arrested in the first instance for ⁵⁰⁷ reasonable cause is not even a colorable defense. Three of these defendants were subordinate officers of the superintendent of police. They did what they did pursuant to orders given by one who had a right to command, presumably. That may, as it ought to, make you feel that they ought not, in a moral sense, be held responsible in damages. But the orders of a superior or of one who had a right to command them is not a legal reason for their omission to comply with the law, which required them in a reasonable time to file an affidavit and procure a warrant. The

court having this conception of the law applicable to the case, there is nothing for you to do but to assess the damages."

It was shown on the trial that the plaintiff was arrested by the defendant officers without warrant, as alleged in the petition, and was imprisoned after such arrest for a period of more than five days without any warrant for his detention and without any charge having been made against him before any competent tribunal or opportunity allowed him for a trial; that during his imprisonment he frequently demanded to be informed of the nature of the charge on which he was detained, and to be taken before a proper court for a hearing thereon; and that at the end of the period named, when he was discharged from prison, no complaint had been filed against him nor trial allowed him. These facts were not disputed. The evidence of the defense was directed entirely to the establishment of good cause for the arrest and to the subject of damages. There was no impropriety, therefore, in the court treating as undisputed the facts above stated, and no complaint is urged here on that account. The objection made is to that part of the charge by which the jury were instructed, in substance, ~~508~~ that though the defendants making the arrest, or causing it to be made, had good cause therefor, that did not justify the imprisonment of the plaintiff thereunder for a longer period than was reasonably necessary to enable the defendants to obtain a warrant or authority from some competent tribunal for his further detention; and that his continued imprisonment without such warrant or authority rendered them liable as wrongdoers from the beginning, leaving only the question of damages for the consideration of the jury. In this charge we think there was no error. It is provided by section 7130 of the Revised Statutes that: "When a felony has been committed any person may without a warrant arrest another who he believes, and has reasonable cause to believe, is guilty of the offense, and may detain him until a legal warrant can be obtained." And section 7143 contains the provision that: "If it becomes necessary for any just cause to adjourn the examination of the accused, the magistrate may order such adjournment and commit the accused from time to time for safekeeping to the jail of the county until the cause of the delay is removed, and no longer; but the whole time of such confinement in jail shall not exceed four days, or the officer having in custody any such person may, by the written order of the magistrate, detain him in custody in some secure and convenient place other than the

jail, to be designated by the magistrate in his order, not exceeding four days."

The right to make arrests without warrant is conferred by the statute in order to prevent the escape of criminals where that is likely to result from delay in procuring a writ for their apprehension, and it was not the purpose to dispense with the necessity of obtaining such writ as soon ⁵⁰⁹ as the situation will reasonably permit. To afford protection to the officer or person making the arrest the authority must be strictly pursued; and no unreasonable delay in procuring a proper warrant for the prisoner's detention can be excused or tolerated. Any other rule would leave the power open to great abuse and oppression. The detention of the plaintiff in prison for a period of five days and more without any writ or order of any court, and in disregard of his repeated demands to be given a hearing, was without excuse or palliation. None was offered. It was a palpable and arbitrary abuse of official power. Not having pursued their authority to arrest without warrant by failing to obtain within a reasonable time a writ or order for the plaintiff's detention, the defendants placed themselves in the same situation as if they had originally acted without authority. It is a familiar rule that one who abuses an authority given him by law becomes a trespasser ab initio. That rule has often been applied in cases like the present one. In *Brock v. Stimson*, 108 Mass. 520, 11 Am. Rep. 390, it was held that: "An officer who arrests an offender without warrant by authority of a statute which authorizes such arrest only as preliminary to taking him before a court is liable to assault and false imprisonment if he omits to take him before the court." Numerous authorities for the similar application of the rule are collected in the opinion of the court in that case, and many others might be cited, some of which are referred to in the brief of the defendant in error. The arresting officer in such case cannot justify the holding of the prisoner without warrant, on the ground that time is necessary to investigate the case, and procure evidence against him. Section 7143 of the Revised Statutes, already quoted, provides for ⁵¹⁰ cases where such delay becomes necessary by authorizing the magistrate before whom the accused is taken to adjourn the examination from time to time, and commit the accused until the cause of the delay is removed. But that section forbids the imprisonment for any period exceeding four days.

In behalf of the plaintiffs in error, Leger, Miller, and Frank, it is contended that as they were subordinate officers acting under orders from the chief of the police force in arresting the defendant in error and delivering him into the custody of the patrolmen, who conveyed him to the city prison in obedience to the chief's orders, they should not be held responsible for his subsequent imprisonment, nor for the omission to obtain the necessary warrant and bring him to trial. But the delivery of the plaintiff after his arrest into the custody of another person, to be by him taken to prison, could not, we think, absolve the arresting officers from the duty required of them to obtain the writ necessary to legalize his further imprisonment. If it could, the imprisonment might with impunity be prolonged indefinitely by the change of custodians and places of confinement at short intervals. The arrest having been made without warrant, it was necessary, in order to preserve the legality of that action, that the proper steps should be taken to prevent the further detention of the prisoner from becoming unlawful; for, as we have seen, unless those steps be taken, all legal protection for such arrest ceases, and the arresting officers become wrongdoers from the beginning, liable as such equally with those by whom the unlawful imprisonment is continued. If the arresting officers choose to rely on some other person to perform that required duty, they take upon themselves the risk of its being performed, and unless it ^{§11} is done in proper time, their liability to the person imprisoned is in nowise lessened or affected. There was no order of a superior officer in this case that did or could prevent the defendants who made the arrest from complying with the requirement of the law in the respect indicated nor excuse their omission to comply therewith.

Judgment affirmed.

ARREST WITHOUT WARRANT—UNREASONABLE DETENTION—FALSE IMPRISONMENT.—If a person is arrested without a warrant, the officer or other person making the arrest must, without unnecessary delay, take the prisoner before a magistrate for examination and commitment, and, if he detains him an unreasonable time before doing so, he is guilty of a false imprisonment, no matter how lawful the original arrest may have been: See monographic note to Tryon v. Pingree, 67 Am. St. Rep. 419, on false imprisonment.

BUCKEYE PIPE LINE COMPANY v. FEE.

[62 Ohio State, 543.]

NEW TRIAL—MOTION FOR—SUFFICIENCY OF.—Under a statute which provides that, if the “decision” is not sustained by sufficient evidence, or is contrary to law, it shall be a ground for a new trial, a motion for a new trial, in a cause tried by the court, upon the ground that the “judgment” is not sustained by sufficient evidence and that it is contrary to law, is sufficient to bring up the evidence in the record for review.

ATTACHMENT—GARNISHMENT.—PROPERTY OUTSIDE OF THE STATE is not the subject of garnishment. To charge a garnishee for the property of the defendant, it is absolutely essential that, at the time of the service of process, he should have it in his possession and within the state.

ATTACHMENT—GARNISHMENT—POWER TO ORDER PROPERTY WITHOUT THE STATE TO BE SURRENDERED.—A court has no jurisdiction, under the process of attachment or garnishment, over property of the defendant outside of the state, and has no power to compel a garnishee, having property of the defendant in his possession without the state, to surrender it into the custody of the court. Hence, an order directing him to make such surrender is without legal effect.

Action by Fee against the pipe line company to recover for its refusal to obey an order of the court of common pleas of Allen county, directing it, as garnishee, to turn over one thousand and thirty barrels of crude petroleum oil to the sheriff of that county. The oil in the possession of the company belonged to Miller, Tallmage & Russell, against whom Fee had recovered judgment for five hundred and thirty-five dollars. The pipe line company was an Ohio corporation. It was a common carrier and storer of oil, but was not a purchaser or seller of oil. Its principal office was at Lima, Ohio, where the books of its business were kept. The oil in its possession on November 7, 1896, and belonging to the judgment debtor, was purchased in Huntington county, Indiana, and was received by the company in Indiana in its usual course of business and was held by it as common carrier and storer of oil. The oil in controversy was never in Ohio. No Indiana oil was carried into or stored in Ohio by the defendant. The oil territory of Indiana, including Huntington county, and the oil territory of northwestern Ohio, including Allen county, Ohio, comprised the territory known as the Lima division of the company. The stations for the delivery of oil were in this territory in both Indiana and Ohio, including the counties of Allen and Huntington, and all transfers of oil were made on its production books at Lima,

Ohio. The oil in controversy was received on a "run ticket," which is referred to in the opinion, and was not seized by the sheriff, who levied by simply leaving a copy of the attachment with the agent of the defendant at Lima, Ohio, and informing him of the contents thereof. Some time after January 1, 1897, the circuit court of Huntington county, Indiana, a court of competent jurisdiction, appointed a receiver for Miller, Talmage & Russell, and directed the defendant to deliver the oil in controversy to such receiver. Fee obtained a judgment for the amount of his claim. A motion for a new trial was overruled and the company excepted. The circuit court affirmed the judgment and the company brought error.

James A. Troup, for the plaintiff in error.

Charles B. Adgate, for the defendant in error.

554 SPEAR, J. A preliminary question was made by defendant in error in the circuit court and is renewed here with respect to the sufficiency of the motion for new trial, and attention is called to the form of the motion, which is: "1. That the judgment is not sustained by sufficient evidence; and 2. It is contrary to law." It is contended that the motion is not sufficient to bring the evidence in the record up for review because the attack is made, not upon the finding or decision of the court, but upon the judgment, and hence the evidence cannot be examined in a reviewing court for any purpose. To sustain this contention would, we think, be to carry technicality to extreme length, especially in view of the provisions of sections 4948 and 5115 of the Revised Statutes, requiring liberality in the construction of proceedings and the disregard of immaterial errors and defects.

555 The statute, section 5305, gives one of the grounds for new trial: "6. That the verdict, report, or decision is not sustained by sufficient evidence or is contrary to law." This provision treats of the final action of a jury, a referee or master, and of a court. A jury's work ends with a verdict, that of a referee or master with a report, and that of a court in a decision. We have here no verdict and no report—simply the action of the court itself. What is a decision as here expressed? Manifestly, it is not simply a finding, for a finding concludes nothing. The defeated party is not hurt by a finding, nor is the controversy ended by it if the action stops there. It would seem that the act called here a decision is intended to embrace

the last act of the court; in other words, the judgment. This would appear to be a rational conclusion, giving to the language of clause 6 a practical construction without the aid of authorities. But the text-books make it clear. It is true that in an abstract sense there is a shade of difference between the import of the word "decision" and the word "judgment." As expressed by Abbott (Abbott's Law Dictionary, 351), "the decision is the resolution of the principles which determine the controversy; the judgment is the formal paper applying them to the rights of the parties." But the same author gives the general definition of decision as "the result of the deliberations of a tribunal; the judicial determination of the question or cause." Freeman, in his work on Judgments, section 2, says: "A judgment, except where the signification of the word has been changed by statute, is defined as being 'the decision or sentence of the law pronounced by a court or other tribunal upon the matter contained in the record.'" Wharton (Wharton's Law Dictionary, 235, 437), gives: "Decision, a judgment," and "Judgment, judicial determination; decision of a ⁵⁵⁶ court." Definitions in other law dictionaries are of like import: See Bouvier, Rapalje, Anderson, Cochran, and others. See, also, *Houston v. Williams*, 13 Cal. 24, 73 Am. Dec. 565. It is insisted by counsel that previous decisions of this court cited in the brief rule this case. We think they have no application to it.

We are of opinion that the language of the motion is a substantial statement of the ground authorized by the sixth clause of section 5305, and should be held sufficient to all intents and purposes.

Coming now to the merits of the case, the question presented is whether or not the court of Allen county had, by virtue of the attachment proceedings, such control or jurisdiction over the property of the defendants situate in Indiana and in the possession of the company as to enable it to make a valid order requiring the garnishee to produce that property in Allen county and surrender it into the custody of the court. And as to the garnishee, the question is not merely whether the garnishee had property of the debtor in its hands, but whether it had the property under such circumstances as to make it answerable for it in Allen county.

It is to be remarked at the outset that an attachment proceeding is exclusively a statutory one, and hence we look to our law

regulating attachments for the source of authority to the court and its officers. What that statute lawfully authorizes the plaintiff in attachment is entitled to demand; what it fails to authorize he may not demand, for it is well established that equity does not and cannot aid the statute. The purpose of the statute is to reach the property of defendant in the suit and subject it to the demand of the plaintiff. In this aspect an attachment proceeding is in the nature of a proceeding in rem, and, as in all proceedings in rem, the thing ⁵⁵⁷ against which the proceedings are directed must be brought within the jurisdiction of the court: 1 Greenleaf on Evidence, secs. 542, 543. The proceeding reaches out for the tangible property of the defendant to be levied on directly by the officer or obtained by garnishee process served on one who may have property of defendant in his possession which the officer cannot get at or may be owing the defendant. The term "attach" implies seizure. As stated by Hosmer, C. J., in Hollister v. Goodale, 8 Conn. 332, 21 Am. Dec. 674: "The word 'attach,' derived remotely from the Latin term 'attingo,' and more immediately from the French 'attacher,' signifies to take or touch, and was adopted as a precise expression of the thing; nam qui nomina intelligit, res etiam intelligit. The only object of attachment is to take out of the defendant's possession and to transfer into the custody of the law, acting through its legal officer, the goods attached, that they may, if necessary, be seized in execution and be disposed of and delivered to the purchaser. From both these considerations it is apparent that to attach is to take actual possession of property. Hence, the legal doctrine is firmly established that to constitute an attachment of goods the officer must have actual possession and custody." This well states the principle at the foundation of the law of attachment, and is to be kept in mind as having an important bearing on the question here. As ancillary to it is the other method of getting at the property by process of garnishment already referred to.

Our statute provides, section 5524 and following, that an order of attachment shall require the officer to attach the goods, etc., of the defendant in his county not exempt, etc., or so much as will satisfy the plaintiff's claim. And that when the property attached "is personal property and can be come at, ⁵⁵⁸ he shall take it into his custody and hold it subject to the order of the court." This seizure and possession is essential to the court's jurisdiction over the property. Orders of attachment

may be issued to the sheriffs of different counties of the state. Where garnishee process issues, if the officer cannot get possession of the property, he shall leave with the garnishee a copy of an order of attachment and a written notice that he appear in court and answer touching the property and credits of the defendant in his possession or under his control; and he shall stand liable to the plaintiff for all property in his hands from the time of notice. If he answer and it be discovered that on or after the service of the order and notice he was possessed of any property of defendant, the court may order the delivery of such property into court. If the garnishee deliver the property disclosed into court, he is allowed his costs.

No question is or could be made that property without the state can, by virtue of a process of attachment, be seized by an Ohio officer, and of course such property could not be delivered into court. And it seems to us clear that, notwithstanding the somewhat general language of the statute respecting garnishment, the property in the garnishee's hands, for which he must answer, is intended by the statute to be limited to property within the state, for it could hardly have been the intention of the general assembly to give a plaintiff in attachment greater power over the tangible property of his debtor situate out of the state by virtue of garnishment than would be possible by the direct process of attachment. On the contrary, it would seem, considering all the statutes together, that the intent is clearly manifest that property which may be sequestered ⁵⁵⁹ in the hands of a garnishee must be within the state in order that it may be taken and sold to satisfy such judgment as may be obtained against the debtor, for it is in contemplation that the officer will seize the property in the possession of the garnishee if he is able to get at it; also that the garnishee may voluntarily surrender it to the officer. The inference seems reasonable that property to be so reached is intended to be confined to such as would be subject to seizure by attachment or execution if in the hands of the debtor himself.

The many inconveniences and hardships which would be likely to follow a contrary holding may be easily imagined. The case at bar presents a marked instance. There being no connection between the system of lines located in the producing oil fields in Indiana and the system located in Ohio, literal obedience to the order of the court would be, if not impossible, at least extremely impracticable. Beside this the court of Allen county has ordered the company to deliver this oil to its sheriff

in that county; the court of Huntington county, Indiana, has ordered it to deliver the oil to its receiver. If both orders are valid the company must deliver the oil in one state and pay its value in the other. A stronger case for the application of the argument *ab inconvenienti* could hardly be conceived.

It is intimated, though not distinctly claimed, that the court, having the person of the garnishee within its jurisdiction, may, by virtue of some general power, enforce its order. Cases arise involving contract relations in which the undertaking to perform an act purely personal may be enforced, though the act relates to property which is extraterritorial, such as decrees for the specific performance of contracts to ⁵⁶⁰ convey land situate in foreign parts. Such execution is not only a strictly personal act, but one to be wholly performed where the decree commanding it is rendered. But the practice cannot prevail as to attachments, for, as already stated, attachment is strictly statutory. Power to entertain such proceeding is given to justices of the peace upon practically the same terms as regulate its exercise by the common pleas, and taking the statutes on the subject as a whole, it is entirely clear that it was never intended to clothe all courts having jurisdiction of the garnishee process with equity powers.

It may not be necessary to the determination of this case to decide whether or not there is power in the general assembly to authorize seizure of property outside the state through attachment and garnishee process, but the consideration that the power is at least extremely doubtful affords another reason for giving to the statutes a construction denying the intent to so provide. It is said in 8 American and English Encyclopedia of Law, 1156: "To charge a garnishee for property of defendant, it is absolutely essential that at the time of service of process he should have it in his possession and within the state." And at page 1255: "The domicile of the garnishee does not give the courts of the state jurisdiction over the debt he owes to a party in another state, and is not sufficient to sustain an action in *rem*. This is not determined by his domicile, but by the situs of the property which he holds." Mr. Justice Story, in his Conflict of Laws, section 543, observes: "But although every nation may thus rightfully exercise jurisdiction over all persons within its domains, yet all are to understand that in regard thereto the doctrine applies only to suits purely personal or to suits connected with property within the same sovereignty. For although a person may ⁵⁶¹ be within the territorial jurisdiction,

yet it is by no means true, in virtue thereof, every sort of suit may there be maintainable against him. A suit cannot, for instance, be maintainable against him so as to absolutely bind his property elsewhere." And section 550: "A nation within whose territory any personal property is actually situate has as entire domination over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there. It may regulate its transfer and subject it to process and execution, and provide for and control the uses and disposition of it to the same extent that it may exert its authority over immovable property." Surely this doctrine cannot be maintained if the courts of a sister state may sequester and control property outside of their limits at their will: See, also, *Rose v. Himely*, 4 Cranch, 241-277. The principle above stated seems to rest upon substantial ground. The exclusive dominion over property being in the country or state where the property is, remedies afforded to creditors by the laws of their state would have no more concern with it than if it were in a foreign land. Such other states could not reach it for the purpose of taxing it, and thus add to their revenues or for the purpose of collecting taxes already due and not otherwise collectible. And what the state cannot do for herself it would seem clear she cannot do for her citizens. A debtor who by himself or his bailee has property in another state has the right to keep it there and such state has an interest in his exercise of the right free from interference by other sovereignties: *Western R. R. Co. v. Thornton*, 60 Ga. 300.

Decisions by courts of high standing in support of the proposition generally that property outside of the state is not the subject of garnishment are ⁵⁶² abundant. Some of them follow: *Lawrence v. Smith*, 45 N. H. 533, 86 Am. Dec. 183; *Young v. Rose*, 31 N. H. 201; *Clark v. Brewer*, 6 Gray, 320; *Pennsylvania R. R. Co. v. Pennock*, 51 Pa. St. 244; *Wheat v. Platte City etc. R. R. Co.*, 4 Kan. 370; *Illinois Cent. R. R. Co. v. Cobb*, 48 Ill. 402; *Sutherland v. Second Nat. Bank*, 78 Ky. 250; *Bates v. Chicago etc. Ry. Co.*, 60 Wis. 296, 50 Am. Rep. 369; *Montrose etc. Co. v. Dodson etc. Mfg. Co.*, 76 Iowa, 172, 14 Am. St. Rep. 213.

But it is insisted that, even though it should be conceded that the general rule is as claimed by plaintiff in error, the contract between Miller, Tallmage & Russell and the company, called the "run ticket," takes this case out of that rule, inasmuch as the oil produced in the two fields was considered and made a

common stock of oil out of which the ticket might be paid by delivery of the quantity of oil at any of the stations of the Lima division; so that the ticket represented so much of the common stock some of which was in Ohio, and hence demand might be satisfied by a delivery at any of the stations in Ohio. The statement of fact is correct so far as it goes, but it ignores the material qualification provided in the ticket, "that the point of delivery shall be at the option of the company." Now it is conceded in argument by defendant in error that "the liability and rights of this garnishee to this attaching creditor are measured by its liability to Miller, Tallmage & Russell." That is, if, under the facts as they existed at the time of the attachment and garnishee process were issued, Miller, Tallmage & Russell could have maintained in Allen county replevin against the company for this oil, and, failing to obtain possession of the oil, would have been entitled to a recovery for its value, then Fee would have the right to reach the same result by attachment and garnishment. But could Miller, Tallmage & Russell have maintained such an action ⁵⁶³ in Allen county at that time? Manifestly not. The option of selecting the point of delivery had not been exercised by the company, as no action by the owners had called for its exercise. Conceding that, upon demand being made by the owners on the company for delivery to them of their oil, with tender of charges, a refusal had followed, they might have maintained replevin anywhere in the Lima division, still the stubborn fact remains that no such demand had been made, nor any refusal. Hence the owners had then no cause of action, and, measuring the attaching creditor's rights by those of the owners of the oil, he had no ground of action. But we are reminded that there was a demand on the company by the sheriff of Allen county after judgment and a refusal. Suppose this to be so, how does it help the matter? The demand was for delivery of the oil in Allen county. It was not accompanied by any tender of charges which had accrued. It was not even made at the time of the service of the writ, but after judgment against the nonresident defendants, and, presumably, after the making of the order on the garnishee, and, if so, could not have been a predicate for such order. The proposition that this demand gave the attaching creditor a right of action entirely loses sight of the fact that no breach of the contract had occurred between Miller, Tallmage & Russell and the company, and that, for aught that appears, it was ready and willing to deliver the oil to them on its line in Indiana. At all

events, if they had then made demand for delivery of the oil in Allen county, it might, with entire regard to all contract rights, have been refused by the company, and they would have had, by reason of refusal of such demand, no right of action. By the same token the sheriff had no such right against the garnishee.

504 Our conclusion is, that the court of common pleas of Allen county did not, by the attachment and garnishment proceeding, acquire jurisdiction of the property of Miller, Tallmage & Russell, in the possession of the company in Indiana, and was without power to make the order on the garnishee to deliver the property into the custody of the court, and that its order in that behalf is without legal effect.

It follows that the judgment of both courts will be reversed, and judgment be entered for plaintiff in error.

ATTACHMENT—GARNISHMENT—PROPERTY OUTSIDE OF THE STATE.—In attachment suits there is no jurisdiction over property not within the state. Property outside of the state cannot be garnished. An attachment execution served on a garnishee in one state cannot bind the defendant's goods in the hands of the garnishee in another state; and garnishment will not lie against personal property in transit and outside the state, but in the custody of a common carrier whose residence is within the state: See the monographic note to *National Bank v. Furtick*, 69 Am. St. Rep. 114, 126, treating of the situs of debts for the purposes of garnishment.

CASES
IN THE
SUPREME COURT
OF
OREGON.

MARKS v. WILLIS.

[38 Oregon, 1.]

INJUNCTION—EXECUTION IN REPLEVIN.—Injunction is the proper remedy to restrain the enforcement of an alternative money judgment in an action for the recovery of personalty after tender of the property.

JUDGMENTS IN REPLEVIN—SATISFACTION.—An ordinary alternative replevin judgment may be satisfied before levy by returning the property named in the writ within a reasonable time, and in such case the defendant cannot be compelled to pay the value.

EXECUTIONS IN REPLEVIN—INJUNCTION.—If, after the rendition of an alternative judgment in replevin, an execution thereon is returned unsatisfied because the officer is unable to obtain the property, this does not justify the issuance of an alias execution directing the enforcement of the alternative money judgment alone. The enforcement of such execution may be enjoined when tender of the property has been made

W. R. Willis, A. M. Crawford, and D. Rice, for the appellant.

J. W. Hamilton, J. C. Fullerton, and F. W. Benson, for the respondent.

• **BEAN, J.** 1. It is first claimed that the plaintiff's remedy was by a motion in the court issuing the execution to quash or recall it, and not by injunction. The mere improper issuance of an execution is ordinarily no ground for equitable interference, but any irregularity in that regard must be corrected by the court issuing the writ: *Gregory v. Ford*, 14 Cal. 138, 73 Am. Dec. 639. But, as we understand it, this suit is not based on a mere irregularity in the form of the execution, nor in the manner of its issuance, although questions of that

kind are argued in the briefs. It is substantially a suit to enjoin the enforcement of an alternative money judgment in an action for the recovery of personal property after a tender of the property described in the judgment and an injunction is a proper remedy in such case: *McClellan v. Marshall*, 19 Iowa, 561, 87 Am. Dec. 454; 1 High on Injunctions, sec. 139; 1 Beach on Injunctions, sec. 625.

2. Passing over, therefore, any questions as to the form of the writ or its regularity, and coming directly to the merits of the controversy, we are agreed that the decree of the court below must be affirmed. The judgment upon which the execution was issued is the ordinary judgment in an action of replevin for the return of the property sued for, or, in default thereof, for its value, and the defendant had a right to discharge it by a return of such property within a reasonable time, and he could be compelled to pay its value only in case a delivery ⁴ could not be had: *Wells on Replevin*, sec. 778; 2 *Freeman on Executions*, sec. 468; *Etchepare v. Aguirre*, 91 Cal. 288, 25 Am. St. Rep. 180; *Meads v. Iasar*, 92 Cal. 221; *Carson v. Applegarth*, 6 Nev. 187. When, therefore, Marks tendered and offered to return the property within five days after the litigation had ended, and before any levy had been made under the writ, it operated as a satisfaction of the judgment, and thereafter no proceedings could legally be had for enforcing, by execution, the alternative judgment for money.

3. Nor is the fact that the first execution was returned unsatisfied because, as the sheriff certifies, he was unable to obtain the property described therein, of any consequence in this connection. We are not dealing with the effect of proceedings under the first writ. Its return unsatisfied did not change the form or character of the judgment, nor authorize or justify the issuance of an alias writ in any form other than that prescribed by statute. An execution must follow the judgment, and under the statute there is but one form of execution on a judgment in an action of replevin: *Hill's Annotated Laws*, sec. 276, subd. 4; and it is satisfied, so far as the subject matter of the litigation is concerned, by a delivery to the officer of the property described in the writ. If, under such an execution, the officer is unable to obtain possession of the property described therein, he may proceed under the same execution to enforce the alternative judgment, and his return would probably be conclusive between the parties, and not subject to collateral attack: *Irvin v. Smith*, 66 Wis. 113. But no attempt was made to enforce

the first execution, and when it was returned unsatisfied it ceased to perform any office in the case except as the basis of the subsequent issuance of an alias writ. It follows that the decree of the court below must be affirmed, and it is so ordered.

REPLEVIN.—THE DELIVERY OF THE PROPERTY, in replevin, is the primary object of the action. The value is to be received in lieu of it only in case a delivery cannot be had: *Swantz v. Pillow*, 50 Ark. 300, 7 Am. St. Rep. 98.

REPLEVIN.—AN INJUNCTION may issue to restrain an execution on an alternative judgment for the value of property replevied in default of a return thereof, where the property has been tendered back within a reasonable time: *McClellan v. Marshall*, 19 Iowa, 561, 87 Am. Dec. 454.

STATE v. SCHUMAN.

[36 Oregon, 16.]

GAME LAWS—CONSTRUCTION.—A statute making it "unlawful to sell, offer for sale, or have in possession for sale any species of trout at any time," applies with as much force to trout lawfully caught in another state, shipped into the state, and becoming a part of the general property thereof, as it does to those caught therein.

APPELLATE PRACTICE.—A CLAIM OF RIGHT, PRIVILEGE, OR IMMUNITY under the constitution of the United States must be asserted and denied in the trial court, or it cannot be considered on appeal.

GAME LAWS —CONSTRUCTION—CONSTITUTIONAL LAW —DUE PROCESS OF LAW.—A statute making it "unlawful to sell, offer for sale, or have in possession for sale any species of trout at any time," applies to trout shipped into the state and offered for sale, and as to a person offering such fish for sale or selling them, the statute is not unconstitutional as depriving him of his property without due process of law.

POLICE POWER—SUBJECTS OF.—The sale of commodities may be subject to the exercise of the police power, though their use does not necessarily subvert the morals, impair the health, or disturb the peace of society.

GAME LAWS—PROHIBITION ON SALE OF GAME.—A state may prohibit the taking or sale of fish within its borders, and if fish are caught in another state, brought into, mingled with, and become a part of the mass of the property of the state where their sale is prohibited, the person who imports them and violates such law must suffer the penalty prescribed thereby.

R. Stott, and E. E. Merges, for the appellant.

D. R. N. Blackburn, attorney general, R. E. Sewall, district attorney, and J. N. Teal, for the state.

²⁰ MOORE, J. 1. It is contended that the act under which defendant was convicted was not intended to apply to trout lawfully caught in another state, and shipped into Oregon. The statute in question (Laws 1899, p. 199) is entitled, "An act to protect trout and other food fishes, and to prevent their destruction by use of powder or chemicals, and providing punishment for a violation thereof." Section 5 of said act reads as follows: "It shall be unlawful to sell, offer for sale, or have in possession for sale, any species of trout at any time." The object of the statute was undoubtedly to protect the trout of this state, and hence it can have no application to trout caught in another state until they are brought into the state of Oregon, and become a part of the general property thereof: *Ex parte Maier*, 103 Cal. 476, 42 Am. St. Rep. 129. Defendant's counsel, to support the legal principle for which they contend, rely upon the case of *State v. McGuire*, 24 Or. 366, in which it was held that to have in one's possession during a closed season, salmon lawfully caught in the state during the open season, was not in violation of an act making it unlawful to fish for salmon in its waters during certain closed seasons, differing in time as to certain rivers, or to receive or have in one's possession, or offer for sale or transportation, or to transport during said closed seasons, salmon "which may be caught in any of the streams ²¹ as aforesaid." The statute then under consideration, if strictly construed and enforced according to such construction, would have necessitated the destruction of vast quantities of salmon lawfully caught and canned during the open seasons; in view of which it was held that, if the act was susceptible of two constructions, that should be adopted which would avoid such manifest injustice, and that the words "as aforesaid" did not relate to the streams themselves, but to the time and manner of taking fish from them. In *Commonwealth v. Wilkinson*, 139 Pa. St. 298, it was held that an act of that state which forbade any person to "kill or expose for sale, or have in his possession after the same has been killed, any quail" between certain dates in each year, did not prohibit the selling or having possession, during said period of quail killed in, and imported from, another state. In *Dickhaut v. State*, 85 Md. 451, 60 Am. St. Rep. 332, the supreme court of Maryland, relying upon the case of *State v. McGuire*, 24 Or. 366, held that an act of the legislative assembly of that state which forbade having rabbits in one's possession during certain months did not apply to such game when killed in another state, and shipped into Maryland during

the closed season. In the cases to which attention has been called it was lawful to have in one's possession, and to offer for sale, during certain months, the game in question, and, inasmuch as the acts are each susceptible of two constructions, it was properly held that such possession or offering for sale was not an offense thereunder. In the case at bar, however, the act provides that, "it shall be unlawful to sell, offer for sale, or have in possession for sale any species of trout at any time." There is no open season reserved, and no saving clause under which trout may be sold, and the statute, being mandatory in character, and not susceptible ²² of two constructions, but certain and unambiguous in its terms, it applies with as much force to trout shipped into this state and becoming a part of its general property as to those caught within its limits: *Ex parte Maier*, 103 Cal. 476, 42 Am. St. Rep. 129; *Roth v. State*, 51 Ohio St. 209, 46 Am. St. Rep. 566; *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140; *State v. Randolph*, 1 Mo. App. 15; *State v. Farrell*, 23 Mo. App. 176; *Commonwealth v. Savage*, 155 Mass. 278; *New York Assn. v. Durham*, 51 N. Y. Super. Ct. 306.

2. It is contended that the trout having been lawfully caught in the state of Washington, and shipped as an article of commerce into this state, the defendant had an unqualified title to them; and, since no presumption of his guilt can be indulged, it must be inferred that he sold them in the original package; and, this being so, to hold that the selling complained of was an offense, under the act in question, would render it obnoxious to, and violative of, article 1, section 8, subdivision 3, of the constitution of the United States, as being an attempt on the part of the legislative assembly to regulate interstate commerce. But we do not consider it necessary to pass upon this question, as it does not appear to have been raised in the court below. The transcript shows that the stipulation was offered in evidence, and that the court thereupon instructed the jury that, if the facts agreed upon were true, the defendant was guilty, and refused to charge, when requested, that, upon the evidence submitted, the jury should return a verdict of not guilty, to which rulings exceptions were taken. It does not appear that the attention of the trial court was called to the claim of immunity from prosecution under the state law because of the sale being made in the original package. In *State v. Tamler*, 19 Or. 528, it was held that a motion ²³ asking the court to direct an acquittal in a criminal case on account of the failure of proof, unless such failure is a total one, must specify wherein it is claimed

such proof fails. Mr. Justice Bean, speaking for the court in deciding the case, says: "If counsel for defendants relied upon the grounds urged here for asking the court below to direct an acquittal of his clients, he should have so stated, and thereby given the court an opportunity to have passed upon them, and, if the ruling was against him, preserve the same on the record, so we could be advised thereof. It is very possible that the grounds upon which the appellant now contends the motion should have been granted might have been obviated at the trial, had they been stated. We are not advised from the record what reason, if any, was assigned in the court below why this motion should have been allowed, nor what question the court actually did decide. We have repeatedly held that error is never presumed, but must be made to affirmatively appear, and, in a case of this kind, the motion should direct the attention of the court and opposite counsel to the precise point made and the grounds thereof."

3. The rule of practice is universal that, under section 709 of the Revised Statutes of the United States, the immunity denied must be specially set up, at the proper time and in the proper way, in the court below. Mr. Chief Justice Waite, in *Spies v. Illinois*, 123 U. S. 131, in discussing this question, says: "To give us jurisdiction under section 709 of the Revised Statutes, because of the denial by the state court of any title, right, privilege, or immunity, claimed under the constitution or any treaty or statute of the United States, it must appear on the record that such title, right, privilege, or immunity was specially 'set up or claimed' at the proper time, in the proper way. To be reviewable here, the decision ²⁴ must be against the right so set up or claimed. As the supreme court of the state was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the supreme court was only authorized to review the judgment for errors committed there, and we can do no more." To the same effect see *Hoyt v. Sheldon*, 1 Black, 518; *Maxwell v. Newbold*, 18 How. 511; *Texas etc. Ry. Co. v. Southern Pac. Co.*, 137 U. S. 48; *Caldwell v. Texas*, 137 U. S. 692; *Sayward v. Denny*, 158 U. S. 180; *Brown v. Massachusetts*, 144 U. S. 573; *Powell v. Brunswick County*, 150 U. S. 433; *Duncan v. Missouri*, 152 U. S. 377; *Miller v. Texas*, 153 U. S. 535; *Moore v. Missouri*, 159 U. S. 673; *Chemical Nat. Bank v. City Bank of Portage*, 160 U. S. 646; *Dibble v. Bellingham Bay Land Co.*, 163 U. S. 63.

4. It is also contended that the trout were wholesome food, and that as long as they remained in that condition they could not become subject to the police power of the state, and that the act prohibiting their sale is tantamount to their destruction, and, if enforced, is a violation of the fourteenth amendment of the constitution of the United States, inasmuch as it would result in depriving the defendant of his property without due process of law. The statute permits the person to have such fish in his possession, to eat them, or give them away, and hence it does not deprive him of his title, but qualifies or limits the rights appurtenant thereto. In *Roth v. State*, 51 Ohio St. 209, 46 Am. St. Rep. 566, it was held that an act of the legislative assembly of Ohio forbidding the sale of quail applied to such game when killed in another state, and shipped into Ohio, and that said act was constitutional, the court saying: "Everyone is presumed ²⁵ to know the law, and persons who acquire such property when the statute is in force take it subject to its provisions." In *State v. Farrell*, 23 Mo. App. 176, it was held that an act of the legislative assembly of Missouri forbidding the possession of quail applied to such game when killed in another state, and brought into Missouri, and that such act did not violate any provision of the constitution of the United States. To the same effect see *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140; *State v. Randolph*, 1 Mo. App. 15; *State v. Judy*, 7 Mo. App. 524.

5. The trout which defendant sold were undoubtedly wholesome food, and the prohibition of their sale by the act under consideration was evidently not predicated upon the usual grounds for the exercise of police power; for their consumption as food would not necessarily subvert the morals, impair the health, or disturb the peace of society. But we do not understand that a commodity must possess any of these properties to render it subject to the exercise of such power. That the state, acting in its sovereign capacity, for the best interest of all its citizens, may prohibit the taking or sale of fish within its borders, is settled beyond controversy. When trout are caught in another state, and brought into and mingled with and become a part of the mass of the property of this state, they become subject to the laws thereof, and defendant, having imported them with knowledge of the existence of such law, must suffer the penalties which it prescribes. It follows that the judgment is affirmed.

GAME LAWS—GAME KILLED BEYOND STATE.—If a statute declares that every person in the state who shall at any time sell, or offer for sale, the hide or meat of any deer, elk, antelope, or mountain sheep, shall be guilty of a misdemeanor, its application extends to the selling of the hide or meat of any such animals, though lawfully killed beyond the state: *Ex parte Maier*, 103 Cal. 476, 42 Am. St. Rep. 129. Compare *Dickhaut v. State*, 85 Md. 451, 60 Am. St. Rep. 832.

GAME LAWS AND THEIR CONSTITUTIONALITY are considered in the monographic note to *Ex parte Maier*, 42 Am. St. Rep. 138-144. Such statutes are constitutional, though made applicable to game killed outside of the state where the killing was lawful: *Roth v. State*, 51 Ohio St. 209, 46 Am. St. Rep. 566.

KOERNER v. WILLAMETTE IRON WORKS.

[86 Oregon, 90.]

MORTGAGES—JUNIOR ENCUMBRANCERS—RIGHTS OF, HOW BARRED.—The rights of a junior lien creditor who has not been made a party to the foreclosure of a senior lien may be barred by a suit for strict foreclosure requiring him to redeem within a reasonable time or stand foreclosed.

Stott, Boise & Stout, for the appellant.

C. D. & D. C. Latourette, for the respondents.

¶1 BEAN, J. This is a suit brought by the purchasers at a sale under a decree foreclosing a mortgage, to require a junior lien creditor, who was not a party to the foreclosure suit, and who subsequently levied upon the property under his judgment, and at a sale became the purchaser, to redeem. The court below entered a decree of strict foreclosure, requiring the defendant to redeem within four months, by the payment of the purchase price, with interest, and, in the event of its failure to comply therewith, that it be forever barred from making such redemption. From this decree the defendant appeals, claiming that the remedy in such case is by a reforeclosure of the original mortgage, a resale of the premises, and distribution of the proceeds according to the priorities of the respective parties.

The question of the proper procedure to bar the rights of a judgment lien creditor, who was not made a party to the foreclosure of a prior mortgage, was considered in the case of *Sellwood v. Gray*, 11 Or. 534, and it was held that a suit to compel him to redeem within a reasonable time or be barred

and foreclosed was the proper practice, and this has since been recognized as the rule. Thus, in *Osborn v. Logus*, 28 Or. 302, 310, Mr. Justice Wolverton, in discussing the question as to whether subsequent lien creditors are necessary parties to a suit to foreclose a mechanic's lien, after quoting the statute, says: "No one will contend, under this statute, that, without the presence of a subsequent lienor as a party defendant, the suit ⁹² could not proceed. The decree without him is not binding, so far as he is concerned. But a purchaser under such a decree may insist upon a redemption by the lienor not made a party, failing in which such lienor will be thenceforth barred of all interest in the premises": Citing *Sellwood v. Gray*, 11 Or. 534. And in the recent case of *Security Sav. Co. v. Mackenzie*, 33 Or. 209, in discussing the form of the decree in a suit to foreclose a vendee's interest under a title bond, it is said: "His [the vendor's] right in this regard is analogous in many respects to the right of a purchaser at foreclosure sale to compel a subsequent lien creditor, who was not made a party to the suit, to redeem. In such case, a court of equity will compel the creditor to exercise his right of redemption within a reasonable time, or, in default thereof, be as effectually foreclosed of his equity of redemption without sale as if he has been made a party to the original decree." So that, while it may be claimed that the case of *Sellwood v. Gray*, 11 Or. 534, could have been put upon another ground, the question now under consideration was squarely in issue and decided, and the doctrine of the case has since been regarded and accepted as sound. Moreover, it is abundantly supported by authority: 7 Ency. of Pl. & Pr. 123; *Parker v. Child*, 25 N. J. Eq. 41; *Bolles v. Duff*, 43 N. Y. 469; *Shaw v. Heisey*, 48 Iowa, 468. We are therefore not disposed to disturb or overrule it, and the decree of the court below is affirmed.

MORTGAGE FORECLOSURE.—THE RIGHTS OF A JUNIOR encumbrancer who has not been made a party to foreclosure proceedings are considered in *Anson v. Anson*, 20 Iowa, 55, 89 Am. Dec. 514; *Frink v. Murphy*, 21 Cal. 108, 81 Am. Dec. 149; note to *Berlack v. Halle*, 1 Am. St. Rep. 190.

BROWN v. SOUTHERN PACIFIC COMPANY.

[36 Oregon, 128.]

DEEDS—COVENANTS, WHEN PERSONAL.—A covenant in a deed to a railroad company agreeing to build a fence along the railroad, or not to hold the company liable "for any damage done to stock belonging to us," omitting the word "assigns," is personal to the grantors, and does not run with the land nor bind tenants or other successors in interest.

RAILROADS—LIABILITY FOR STOCK KILLED—STATUTORY NOTICE.—Under a statute providing that a railroad company shall be liable to the owners of stock killed for damages resulting from failure to fence its track, "provided, however, that no action shall be maintained until such owner has given at least thirty days' notice in writing to the company," a notice including plaintiff's stock as well as stock owned jointly by himself and a third person for which he seeks to recover, and signed by both, is sufficient. Such notice is not jurisdictional.

Carson & Fleming, for the appellant.

A. H. Tanner, for the respondent.

129 MOORE, J. 1. The question presented for consideration is as to whether the covenant in the deed of Samuel Brown and wife to the Oregon & California Railroad Company created a charge upon their estate running with the land, and binding upon plaintiff. The said covenant is as follows: "And we further agree to build and maintain a fence on such side of said railroad through the premises herein, north of the town of Gervais, or not hold such railroad responsible for any damage done to stock belonging to us." The right to have a division fence built or repaired by an adjoining proprietor is a benefit to the dominant ¹³⁰ and a detriment to the servient estate, which is in the nature of a distinct easement, affecting the lands of the proprietor upon whom the burden is imposed: Tyler on Boundaries, 343; Washburn on Easements, 2d ed., 601; Bronson v. Coffin, 108 Mass. 175, 11 Am. Rep. 335. It has been held that a covenant to build or maintain a division fence creates an encumbrance upon the covenantor's estate, which runs with the land, if so intended by the parties to the deed: 12 Am. & Eng. Ency. of Law, 2d ed., 1049; Beach v. Crain, 2 N. Y. 86, 49 Am. Dec. 369; Burbank v. Pillsbury, 48 N. H. 475, 97 Am. Dec. 633. In order to determine whether a clause in a deed conveying real property is to be construed as a covenant running with the land, or a condition personal to the parties, it is necessary to consider two subordinate questions: 1. Whether the right granted or the burden imposed is con-

nected with the land affected by the conveyance, or collateral to it; and 2. If found to be the former, whether the situation of the parties and the condition of the subject matter enable the court to say, from an inspection of the language of the deed, that it was the intention of the parties thereto that the covenant should run with the land: *Masury v. Southworth*, 9 Ohio St. 340. In *Kellogg v. Robinson*, 6 Vt. 276, 27 Am. Dec. 550, Mr. Justice Phelps, after speaking of those covenants which necessarily run with the land, says: "There is another class of covenants of a doubtful or equivocal character, and which may be treated either as merely personal, or as annexed to and running with the land. With respect to these, it is doubtless competent for the contracting parties to make them either the one or the other, as they think expedient. When, therefore, the party covenants for himself and his assigns, it evinces an intent to bind the land, and the obligation becomes connected with and qualifies his estate."

¹³¹ An examination of the covenant in the deed of Samuel Brown and wife shows that it does not include their "assigns" in express words, and, inasmuch as the fence along the right of way was not in esse at the time the deed was executed, it is contended that the omission in this particular manifests an intention that the covenant should be personal only. "When the covenant," says Lord Coke, in *Spencer's Case*, 5 Coke, 16, 1 Smith Lead. Cas. 137, "extends to a thing in esse, parcel of the demise, the thing to be done by force of the covenant is quodam modo annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee, although he be not bound by express words; but, when the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which hath no being—as, if the lessee covenants to repair the house demised to him during the term, that is parcel of the contract, and extends to the support of the thing demised, and therefore is quodam modo annexed appurtenant to houses, and shall bind the assignee, although he be not bound expressly by the covenant; but in the case at bar the covenant concerns a thing which was not in esse at the time of the demise made, but to be newly built after, and therefore shall bind the covenantor, his executors or administrators, and not the assignee, for the law will not annex the covenant to a thing which hath no being." In *Kellogg v. Robinson*, 6 Vt. 276, 27 Am. Dec. 550, which was an action upon a covenant against

encumbrances, it was alleged in the declaration that in a certain deed the grantee had covenanted to make and maintain the partition fences, and at the trial it was contended that, as it was not averred that the assignees of the grantee were to be bound by the covenant, and as the fence was not in esse at the time the conveyance was executed, the covenant never became effective; but, it appearing ¹³² that the fence had afterward been built by the grantee, it was held that the first clause of the covenant was thereby satisfied, and the latter clause became operative, as concerning a thing in esse. In *Masury v. Southworth*, 9 Ohio St. 340, the court held that the omission of the word "assigns" in a lease containing a covenant on the part of the lessee to insure a building on the demised premises did not exempt the assignee of the lease from the performance of its conditions, when it was apparent from an inspection of the instrument that it was the intention of the original parties thereto to make the covenant run with the land. Mr. Justice Gholson, commenting upon the rule announced in *Spencer's Case*, 5 Coke, 16, 1 Smith Lead. Cas. 137, says: "When any effect, such as to pass an estate or create an obligation, is dependent upon the intent of parties as expressed in a writing, it is an important inquiry whether the law has prescribed certain words or expressions as essential to be used to indicate that intent. If it be so, those words must be used, and none others will suffice. The word 'heirs' in the case of a conveyance to create an estate in fee simple is an instance. But, where the law has prescribed no such words, then the intent of the parties must be ascertained from the whole instrument, interpreted and construed by just and proper rules."

In *Duffy v. New York etc. R. R. Co.*, 2 Hilt. 496, the plaintiff, having hired a pasture belonging to one Mrs. Bassford, turned his horse therein, which escaped through a defective fence, and, getting upon the railroad track, was killed. In an action to recover the damage thus sustained, it appeared that Bassford and his wife had executed a deed to defendant of a strip of land adjoining said pasture lot, containing a covenant on the part of the grantors for themselves, their heirs, executors, and administrators, to erect a fence and maintain the same in good repair for eighteen years, and it was ¹³³ held that, notwithstanding the word "assigns" was not used in the deed, the covenant was intended to run with the land, and was binding upon all persons claiming or occupying the premises under the party making the covenant. The court, in rendering

the decision, alludes to *Spencer's Case*, 5 Coke, 16, 1 Smith Lead. Cas. 137, and says: "But this nice distinction, originating at a time when it was necessary to use the word 'heirs,' or other words of inheritance, in a conveyance, in order to grant or convey an estate in fee, cannot be now said to exist, as in *Norman v. Wells*, 17 Wend. 136, it was determined that those covenants run with the land, which are made touching or concerning it, and affect its value, and are not confined to those which relate to some physical act or omission upon it." The word "heirs" is not now necessary to create or convey an estate in fee simple. All of the grantor's estate passes by his deed, unless the intent to convey a less estate appears by express terms, or is necessarily implied from the language of the deed: *Hill's Annotated Laws*, sec. 3005. The statute not having prescribed that the word "assigns," or other words of like import, shall be necessary to make a covenant run with the land, the omission of such words from a deed by which a right is connected with the dominant estate, or an obligation inheres in the servient estate, does not necessarily evidence an intention that the clause conferring the right or imposing the burden is a condition personal to the party charged with its performance. An examination of the language of the deed for the purpose of ascertaining the intention of the parties, shows that the grantors stipulated, in effect, that, if they neglected to build or maintain the fence agreed upon, the grantee should not be held responsible for any damage resulting from such neglect to stock belonging to them. This exemption from liability is the legal result of the grantors' failure to comply with the terms of their deed, ¹³⁴ and necessarily follows their neglect to build and maintain the fence, without being recited in the deed; for the rule is well settled that, if an adjoining land owner agree with a railroad company to build and maintain a fence along its right of way, the company is not liable to such proprietor, or to his assigns, who take his estate with notice thereof, for injury resulting from neglect to perform or keep such agreement: 12 Am. & Eng. Ency. of Law, 2d ed., 1071; *St. Louis etc. Ry. Co. v. Washburn*, 97 Ill. 253; *Duffy v. New York etc. R. R. Co.*, 2 Hilt. 496.

No agreement, however, entered into between a railroad company and an adjoining proprietor, whereby he stipulates to build and maintain division fences, will absolve the company from liability to persons not parties to the contract, or in privity with them, for injury resulting from the land owner's

failure to keep his engagement in this respect: 12 Am. & Eng. Ency. of Law, 2d ed., 1072; Wabash Ry. Co. v. Williamson, 104 Ind. 154; Warren v. Keokuk etc. R. R. Co., 41 Iowa, 484; Thomas v. Hannibal etc. R. R. Co., 82 Mo. 538; Gilman v. European etc. Ry. Co., 60 Me. 235. A tenant, who enters upon land with notice of his landlord's covenant with a railroad company to build and maintain a division fence along the right of way, can acquire by the demise no greater estate in the premises than his landlord possessed therein, and hence he has no remedy against the company for injury to his stock resulting from the landlord's failure to build or repair such fence: Easter v. Little Miami R. R. Co., 14 Ohio St. 48; Duffy v. New York etc. R. R. Co., 2 Hilt. 496; Indianapolis etc. Ry. Co. v. Petty, 25 Ind. 413; St. Louis etc. Ry. Co. v. Washburn, 7 Ill. 253. If Samuel Brown and his wife had leased their land, their tenant's stock could not in any sense, be regarded as their own. The right conferred by their deed upon the railroad company was, so far as they were ¹²⁵ concerned, to permit it to operate its trains without fencing its right of way, and by exempting it from liability for injury to stock belonging to them they would, in such case, thereby impliedly reserve the right to their tenant, which he could enforce, of compelling it to fence its track across their premises, or be responsible to him for any injury to his stock in consequence of a failure to do so; for by exempting the company from liability for stock belonging to them only they restricted its right to use the track without fencing to the time in which they had possession of the premises, and made it responsible to their tenant for damage done by it to his stock in consequence of its failure to fence the track through said premises; and what is true of their tenant's stock must apply with equal force and reason to the stock of their successor in interest. The failure to include the word "assigns" in the deed is not controlling, if it can reasonably be inferred from the language of the instrument that the parties intended that the covenant should run with the land; but the absence of such word, or other words of like import, may be considered in connection with the context of the deed in arriving at the intent of the parties in this respect. Giving to the deed such construction, we think the parties thereto never intended that the stipulation to build and maintain the fence should be regarded as a covenant running with the land, but that such clause was meant to be a condition personal to the grantors, and binding upon them only.

It is alleged in the answer, and denied in the reply, that plaintiff is the successor in interest of Samuel Brown. The bill of exceptions, however, shows that plaintiff, in answer to the question, "In what way were you occupying this land at the time these cattle were killed respectively?" said: "I was employed by my mother. She had a life lease on the place, but she died since I began this ¹³⁶ suit against the company. I was working for a salary, and kept my stock on the place." The pasturing of this stock necessarily created a privity of estate, but whether he was the tenant of his mother, or the successor in interest of his father, can be of little consequence, for, in either event, he was not bound by their agreement. Giving to the deed such an interpretation, we think the court erred in instructing the jury to find for the defendant.

2. In view of a new trial it becomes important to consider another error alleged to have been committed by the trial court. The action is founded upon the statute which requires certain railroad companies in Oregon to fence their tracks, and provides that for any neglect in this respect they shall be liable to the owners of stock for any damages which may result thereto in consequence of such neglect, and also for reasonable attorneys' fees; provided, however, that no action shall be maintained until after such owner has given at least thirty days' notice in writing to such railroad company: Laws 1893, p. 28. Plaintiff, more than thirty days prior to the commencement of the action, served upon W. W. Skinner, a station agent of the defendant at Salem, a notice, of which the following is a copy:

"To the Southern Pacific Company:

"Notice is hereby given that Mrs. Elizabeth Brown, a widow residing near Gervais, Marion county, Oregon, and Sam H. Brown, a farmer residing near Gervais aforesaid, claim of and from you the sum of two hundred and forty-five dollars, the reasonable value of four thoroughbred cows, one colt, and one calf, wrongfully and negligently killed by you upon your line of railroad near Gervais aforesaid on and between the first day of February, 1894, and the fifth day of November, 1895; and, unless the said sum be paid within thirty days from the date of service of this notice upon you, an action will be commenced against you in the circuit court of Oregon for Marion county, by said ¹³⁷ Elizabeth Brown and Sam H. Brown, to recover from you the said two hundred and forty-five dollars,

and the costs and disbursements of said action, together with such further sum as the court may adjudge reasonable to be allowed as attorneys' fees in said action.

"Dated at Salem, Oregon, this nineteenth day of December, 1895.

ELIZABETH BROWN, and
"SAM H. BROWN,
"By CARSON & FLEMING,
"Their Attorneys."

It was alleged in the complaint, in substance, that plaintiff gave the required notice, including therein a demand for a colt and a calf killed in July, 1895; but said colt and calf were owned jointly by plaintiff and Elizabeth Brown, and plaintiff is not seeking to recover the value of said colt and calf in this action. The answer denies that said notice contained a demand for one colt or one calf, or that said colt or calf were jointly owned by plaintiff and Elizabeth Brown. The plaintiff, being called as a witness, testified that the cows mentioned in the complaint were the ones described in the notice, and were owned by him at the time they were killed, but that his mother, Elizabeth Brown, owned the colt and calf described in the notice. Said notice was then offered in evidence, and, the court having sustained an objection to its introduction on the ground that it was joint, plaintiff's counsel excepted to the ruling, and contends that the court erred in this respect. If the allegation of the complaint with respect to the joint ownership of the stock had been established upon the trial, plaintiff would undoubtedly have been "such owner," within the meaning of the act. The object of the statute requiring notice to be served is to give to the railroad company an opportunity to settle the claim of damages resulting from its neglect, thereby avoiding the expense of an action; and this object was fully accomplished by the service of the notice offered in evidence. The notice is not jurisdictional, nor does the statute prescribe the form thereof, ¹³⁸ and, in our judgment, the court erred in not receiving it in evidence. It follows that the judgment is reversed, and a new trial ordered.

A COVENANT TO BUILD AND MAINTAIN A PARTITION FENCE does not run with the land, but is personal: Monographic note to Gibson v. Holden, 56 Am. Rep. 162. Compare Hazlett v. Sinclair, 76 Ind. 488, 40 Am. Rep. 254; and see Hickey v. Lake Shore etc. Ry. Co., 51 Ohio St. 40, 46 Am. St. Rep. 545.

THE LIABILITY OF RAILWAYS FOR INJURIES TO STOCK trespassing on their tracks is considered at length in the note to Tonawanda R. R. Co. v. Munger, 49 Am. Dec. 261-273.

MONTEITH v. PARKER.

[36 Oregon, 170.]

MUNICIPAL CORPORATIONS—INTEREST ON WARRANTS.—Warrants for the payment of money against a municipal corporation presented to the city treasurer and indorsed by him "not paid for want of funds," as authorized by ordinance, are there after interest bearing from that date.

MUNICIPAL CORPORATIONS ARE LIABLE FOR INTEREST on their debts the same as individuals.

MUNICIPAL CORPORATIONS—INTEREST ON WARRANTS.—If an interest bearing warrant against a city is surrendered and others to an equal amount are issued in lieu thereof, and dated and indorsed as the original, the later issue cannot be regarded as a payment, but merely as an exchange, and they too bear interest the same as the original.

Cox, Cotton, Teal & Minor and J. M. Long, for the appellant.

Weatherford & Wyatt, for the respondent.

¹⁷³ MOORE, J. The charter of the city of Albany contains the following provision: "The city of Albany shall not be bound by any contract, or in any way liable thereon, unless the same is authorized by ordinance," etc.: Charter of Albany, c. 11, sec. 137; Laws 1891, p. 720. At the time the warrants in question were issued, section 4 of ordinance No. 161 of said city was in force, and provided that: "When any city warrant shall be presented to the city treasurer, and there is no money in the treasury to pay the same, the treasurer shall indorse on the back of said warrant, 'Presented and not paid for want of funds,' also the time of making such indorsement; and he shall keep a record of such orders or warrants, in a book kept for that purpose; whenever the city treasurer shall pay any such warrant so indorsed he shall cancel the same, as other warrants are canceled by him, and enter the ¹⁷⁴ same in the book of indorsed orders." If it be conceded that no authority existed for writing on the face of the warrants the clause to the effect that they should bear interest, yet, each warrant having been presented to the city treasurer, and indorsed by him, "Not paid for want of funds," the question is presented whether this indorsement rendered them interest bearing at the legal rate prescribed by statute. The statute regulating the rate of interest, which was in force when these warrants were indorsed, provided: "That the rate of interest in this state shall be eight per centum per annum and no more on all moneys after the same become due": Hill's Annotated Laws, sec. 3587. The

state treasurer is required, if there are no funds on hand with which to pay state warrants, to indorse thereon, "Not paid for want of funds," together with the date, and all warrants so indorsed shall draw legal interest from such indorsement: Hill's Annotated Laws, sec. 2219, subd. 3. If there be no funds with which to pay county orders, the county treasurer is required to make the same indorsement upon them when presented to him, and such indorsement entitles them to draw legal interest until notice is given that there are funds for their redemption: Hill's Annotated Laws, sec. 2465; Laws 1893, p. 59.

1. It is contended by plaintiff's counsel that a municipality is invested by the legislative assembly with delegated power, in the exercise of which it becomes a sovereign in a degree similar to that of the state or of a county, and that, inasmuch as the statute contains no provision regulating the payment of interest upon city warrants, the city is not liable therefor, unless made so by its ordinance providing for the payment thereof, and that the indorsement of a city treasurer upon such warrant to the effect that it was not paid for want of funds is ineffectual to make it interest bearing. The state, by reason of its sovereignty, cannot be compelled to pay interest ¹⁷⁵ on its debts after they become due, without its consent, evidenced by an act of its legislative assembly, or by lawful contract of its executing officers: *United States v. North Carolina*, 136 U. S. 211; *Carr v. State*, 127 Ind. 204, 22 Am. St. Rep. 624. So, too, a county, which is an instrumentality of the state, and organized to promote the general welfare, exercises a degree of sovereign power which renders it exempt from the payment of interest upon its matured debts, unless by its agreement or by legislative enactment the duty of paying interest is imposed upon it: *Seton v. Hoyt*, 34 Or. 266, 75 Am. St. Rep. 641. The legislative assembly, recognizing the existence of this legal principle, has furnished the creditor a method by which he may secure from the state or from a county a recognition of the maturity of its obligation, and an admission of its liability to pay interest thereon. The fact that the legislative assembly has not prescribed a method by which a creditor may compel a city to pay interest on its matured obligation is a circumstance tending to show that a municipal corporation was considered by the law-making body as a private person, and subject to the provisions of the statute regulating the payment of interest by natural persons. Notwithstanding a municipal corporation has delegated to it certain powers of government, it

is to be regarded as a private person with respect to its contracts, which are to be construed in the same manner and with like effect as those of natural persons: *Touchard v. Touchard*, 5 Cal. 306; *Argenti v. San Francisco*, 16 Cal. 255. The rule announced in those cases was practically affirmed in this court in the case of *Shipley v. Hacheney*, 34 Or. 303, in which it was held that the liability of a city for interest on its debts does not materially differ from that of an individual. The reason for the distinction ¹⁷⁶ that a municipal corporation is subjected to burdens and exposed to liabilities not imposed upon a county is found in the fact that it is endowed by the legislative assembly with greater power. A county, as a division of the state, may impose taxes upon the property of its citizens, provided they are equal and uniform. A city, in addition to exercising the same power, may make local improvements, and assess the cost thereof upon the property specially benefited thereby, which a county is not empowered to do. Many similar instances could readily be cited, showing the superior power delegated to a city, but the one given is sufficient. This grant of additional power to a city carries with it corresponding obligations, among which is a liability upon its contracts to the same extent as is imposed by law upon private persons: *Dillon on Municipal Corporations*, 4th ed., secs. 26, 966. "The rule in respect to interest on debts against municipal corporations does not ordinarily differ from that which applies to individuals": *Dillon on Municipal Corporations*, 4th ed., sec. 506. In addition to the cases cited by Mr. Chief Justice Wolverton, in *Shipley v. Hacheney*, 34 Or. 303, as illustrative of this legal principle, see *Seymour v. Spokane*, 6 Wash. 362.

The contracts of a municipality being treated as those of a natural person brings the obligation of a city for the payment of money within the general provisions of the statute rendering such evidence of debt interest bearing after the same become due: *Hill's Annotated Laws*, sec. 3587. Whatever the rule may have been at common law with respect to the payment of interest, commercial transactions between private persons have so multiplied in modern times that a promise to pay interest is necessarily implied from the inability, failure, or neglect of a debtor to pay money when it becomes due: *Thorndike v. United States*, 2 Mason, 1; *Fed. Cas. No. 13,987*; and our statute, ¹⁷⁷ operating upon such promise, enforces it in favor of a creditor. When a warrant is issued for the unconditional payment of money by a city, the municipal corporation is not bound, like

a private person, to seek its creditor, to make payment of its indebtedness, the law implying from the issue of the warrant that it is payable upon demand at its treasury: *Pekin v. Reynolds*, 31 Ill. 529, 83 Am. Dec. 244. This imposes upon the creditor holding the warrant the duty of making a demand upon the city treasurer for its payment, thereby fixing the maturity of the debt, and, if not paid for want of funds, putting the city in default: *Sibley v. Pine County*, 31 Minn. 201. And the treasurer's indorsement of this fact upon the warrant, in pursuance of an ordinance authorizing it, affords the evidence that it bears interest from the date of such indorsement: *People v. Canal Commrs.*, 5 Denio, 401; *State v. Trustees*, 61 Mo. 155; *Poultney v. Wells*, 1 Aiken, *180. The warrants involved in this suit were presented to the treasurer at the time they were issued, and indorsed by him, "Not paid for want of funds." This, as we have seen, made them interest bearing from that date.

2. The warrant for five thousand dollars, it will be remembered, was surrendered, and five others, of one thousand dollars each, were issued in lieu thereof, and dated and indorsed as the original. "Equity regards the substance and intent, not the form": 11 Am. & Eng. Ency. of Law, 2d ed., 184. This maxim is as applicable at the present time as it was when it was first formulated. Invoking it here, we conclude that the issue of the latter warrants was not a payment, but an exchange for the original, including the principal and interest due thereon. It follows from the foregoing that the warrants in question bear interest from the date of ¹⁷⁸ their indorsement, and the court erred in enjoining the payment of such interest. The part of the decree appealed from is therefore reversed, and the injunction dissolved, the appellants to recover their costs in this court and in the court below.

INTEREST—LIABILITY OF MUNICIPALITY FOR.—The indebtedness of a municipal corporation does not bear interest in the absence of an express agreement to that effect, and of legislation giving power to contract for the payment of interest: *Pekin v. Reynolds*, 31 Ill. 529, 83 Am. Dec. 244. The liability of a state to pay interest is considered in the note to *Carr v. State*, 22 Am. St. Rep. 648.

INTEREST.—IF COUPONS TO CITY BONDS can, in any event, draw interest, it can be only after a proper demand of payment: *Pekin v. Reynolds*, 31 Ill. 529, 83 Am. Dec. 244. That interest is recoverable on coupons after their maturity, see the monographic note to *Morris Canal Co. v. Fisher*, 64 Am. Dec. 441.

EX PARTE YOUNG.

[36 Oregon, 247.]

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—INTERFERENCE WITH SEAMEN.—A statute making it a crime to persuade or attempt to persuade any seaman to leave any vessel within the jurisdiction of the state, is a valid exercise of the police power, and not unconstitutional as a regulation of or interference with interstate or foreign commerce.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE.—It is only when a statute of a state conflicts with an act of Congress regulating foreign or interstate commerce, or contravenes the general policy of the government, that it must yield.

CONSTITUTIONAL LAW—REGULATION OF COMMERCE. A state has power to enact a statute regulating commerce within its borders if the subject covered is one over which Congress has not assumed control.

C. M. Idleman, C. F. Lord, and D. R. N. Blackburn, attorney general, for the state.

²⁴⁷ MOORE, J. The question presented by this appeal is whether the statute under which Young was indicted is violative of ²⁴⁸ the constitution of the United States, article 1, section 8, subdivision 3, as being an attempt on the part of the legislative assembly to regulate commerce with foreign nations. The act under consideration reads as follows: "If any person or persons shall entice, persuade, or by any means attempt to persuade, any seaman to desert from, or without permission of the officer then in command thereof to leave or depart therefrom, either temporarily or otherwise, any ship or steamer or other vessel while such ship, steamer, or other vessel is within the waters under the jurisdiction of this state or within the waters of the concurrent jurisdiction of this state and the territory of Washington, such person or persons shall, upon conviction thereof before any justice of the peace, or before a circuit court of this state, be punished," etc.: Hill's Annotated Laws, sec. 1952. Notwithstanding Congress possesses power to regulate commerce with foreign nations and among the several states, each state has retained a sufficient measure of power to enable it to enforce its internal police regulations, in the exercise of which it can establish and regulate ferries across its navigable rivers, control the moving of vessels in harbors within its borders, and enact health and inspection laws, which, by quarantine or otherwise, may operate on persons brought within its jurisdiction in the course of commercial operation: 22 Am. & Eng. Ency. of Law, 1st ed., 712; King v. American Trans. Co., 1

Flip. 1; Fed. Cas. No. 7,787. Thus, a vessel owned by a citizen of Pennsylvania, and licensed under the laws of the United States to be employed in the coasting and fishing trade, was seized and condemned under a statute of Maryland making it unlawful to take oysters within the waters of the latter state with a scoop or drag, and prescribing as a penalty for a violation thereof the forfeiture of the vessel so offending; and it was held that the act in question was a proper exercise of the ²⁴⁹ internal police power of a state, which was not repugnant to the commerce clause of the constitution of the United States: *Smith v. Maryland*, 18 How. 71. It is only when a statute of a state conflicts with an act of Congress regulating foreign or interstate commerce, or contravenes the general policy of the government, that it must yield. As was said by Mr. Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. 1: "The nullity of any act inconsistent with the constitution is produced by the declaration that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties is to such acts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interfere with or are contrary to the laws of Congress made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case the act of Congress or the treaty is supreme, and the law of the state, though enacted in the exercise of powers not controverted, must yield to it."

Congress has prescribed a punishment for any person who shall harbor or secrete a seaman belonging to any vessel, knowing him to belong thereto: U. S. Rev. Stats., sec. 4601. In construing this section it has been repeatedly held, however, that the penalty therein prescribed does not apply to the harboring or secreting of any person employed as a seaman on a vessel which does not belong to a citizen of the United States: *Ex parte D'Oliviera*, 1 Gall. 474; Fed. Cas. No. 3,967; *United States v. Minges*, 16 Fed. Rep. 657; *Grant v. United States*, 7 C. C. A. 436; 58 Fed. Rep. 694. But, if it were held that this section applied with equal force to seamen employed on a foreign vessel, section 1952 of Hill's Annotated Laws, not being repugnant thereto or inconsistent therewith, is enforceable ²⁵⁰ in the courts of this state; the rule being that the statute of a state and an act of Congress may each prohibit the commission of the same offense, and prescribe the same or a different

punishment therefor, under which the party found guilty thereof may suffer the penalties provided by the laws of the United States and of the state: *Territory v. Coleman*, 1 Or. 192, 75 Am. Dec. 554; *State v. Brown*, 2 Or. 221; *Fox v. Ohio*, 5 How. 410; *United States v. Marigold*, 9 How. *560; *Moore v. Illinois*, 14 How. 13; *Ex parte Siebold*, 100 U. S. 371; *Cross v. North Carolina*, 132 U. S. 131. If the statute under consideration be deemed a regulation of commerce, it is local in its application and limited in its operation; and Congress not having assumed control of the subject thereof, it is within the power of the state to prescribe the necessary regulations: *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Brown v. Houston*, 114 U. S. 622. The act in question is a rightful exercise of the police power of the state, in the regulation of the matters to which it applies; and, instead of being in conflict with any regulation of Congress upon the subject, or in contravention of the general policy of the government, it is in fact in aid of commerce rather than in restriction of it: *Smith v. Alabama*, 124 U. S. 465; *Western Union Tel. Co. v. James*, 162 U. S. 650; *Hennington v. Georgia*, 163 U. S. 299; *New York etc. Ry. Co. v. New York*, 165 U. S. 628; *Gladson v. Minnesota*, 166 U. S. 427; *Chicago etc. R. R. Co. v. Solan*, 169 U. S. 133. The court having erred in discharging the plaintiff, it follows that the judgment is reversed and the cause remanded, with instructions to the court below to have him apprehended, and to require him to plead to the indictment.

INTERSTATE COMMERCE.—STATE LEGISLATION which is not an obstacle to interstate commerce, and which comes within a proper exercise of the police power is not unconstitutional as infringing upon the power of Congress: *Burdick v. People*, 149 Ill. 600, 41 Am. St. Rep. 329. While Congress has power to supersede all conflicting legislation upon the subject of interstate commerce, yet, until its powers are asserted, a state has the right to pass laws necessary to preserve the health and morals of its people, though their enforcement may involve some slight delay in the transportation of goods or persons: *State v. Southern Ry. Co.*, 119 N. O. 814, 56 Am. St. Rep. 689. See, further, on this question, the monographic note to *People v. Wemple*, 27 Am. St. Rep. 547-568.

EX PARTE KAMETA.

[36 Oregon, 251.]

MUNICIPAL CORPORATIONS—POWER TO SUPPRESS GAMING.—A city authorized by its charter to prevent and suppress gaming and gambling-houses within its limits is vested with power to punish and suppress gaming as a substantive offense.

LOTTERY—GAMING.—A lottery is gaming within the provisions of a city charter authorizing the city to prevent and suppress gaming.

LOTTERY—MUNICIPAL ORDINANCES — BURDEN OF PROOF.—A municipal ordinance making it a criminal offense for any person to have a lottery ticket in his possession, unless such possession is shown to be innocent, or for a lawful purpose, is void, as casting the burden of proof upon the defendant to show his innocence.

J. M. Long, corporation counsel, and R. R. Duniway, for the appellant.

Bernstein & Cohen and J. J. Fitzgerald, for the respondent.

²⁵¹ BEAN, J. This is an appeal from a judgment in a habeas corpus proceeding. In May, 1895, the common council of the city of Portland passed ordinance No. 10,259, "to prohibit the sale of or having in possession lottery tickets or tools or instruments used or intended to be used in making lottery tickets," which provides as follows:

"Section 1. That it shall be unlawful for any person within the corporate limits of the city of Portland to sell ²⁵² or offer for sale any lottery ticket, certificate, paper, or instrument purporting, or representing, or understood to be, or to represent, any ticket, chance, share, or interest in, or depending upon the event of, any lottery. That it shall be unlawful for any person to have in his or her possession, unless it be shown that such possession is innocent, or for a lawful purpose, any lottery ticket, certificate, or paper as aforesaid, or any tool, instrument, stamp, or device used or intended to be used in or for contriving, setting up, preparing, or drawing any lottery, or preparing for sale or distribution any lottery ticket or tickets.

"Sec. 2. Any person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and on conviction thereof before the municipal court shall be punished by a fine of not less than twenty dollars, and not more than two hundred dollars, or by imprisonment not less than ten days nor more than ninety days."

The petitioner was arrested under the ordinance in September, 1899, on a complaint charging that within the corporate limits of the city he "did willfully and unlawfully have in his possession, for an unlawful purpose, a lottery ticket and tickets, tools, instruments, stamps, and devices used and intended to be used in contriving, preparing for sale, and distribution of said lottery tickets, . . . whereby the peace and quiet of said city was disturbed; contrary to the ordinance in such case made and provided." Upon his trial he was convicted, and sentenced to pay a fine of seventy-five dollars, in default of which he was committed to the city jail until payment thereof, not to exceed thirty-seven and one-half days. He was thereafter discharged in a proceeding on habeas corpus, and hence this appeal.

1. The claim for the petitioner is that the ordinance is void, because: 1. Of a want of power in the city to enact it; and 2. The particular provision which he is charged ²⁵³ with violating puts upon a defendant the burden of showing his innocence, and is, therefore, in violation of his constitutional rights. By the charter in force at the time of the passage of the ordinance it is provided that "the council has power and authority," within the city, "to prevent and suppress gaming and gambling-houses, or places where any game in which chance predominates is played for anything of value, and to punish any person who engages in such game or keeps or frequents such houses": Laws 1893, sec. 36, subd. 5, p. 820. It is contended that this provision of the charter does not authorize or empower the city to prevent and suppress gaming as a substantive offense, but only gaming or gambling-houses; but, if it is held otherwise, the ordinance nevertheless is void, because a lottery is not gaming, within the meaning of the charter. We are quite well satisfied the word "gaming" is used in the charter as a substantive and not as an adjective, and that the city is vested with power to punish and suppress gaming as a substantive offense. In the construction of the charter the court ought not to lose sight of its object and purpose, and the evil it was intended to authorize the city to suppress. As said by Judge Deady, in construing the same charter provision in *In re Lee Tong*, 18 Fed. Rep. 253, 257: "It is evident that there is as much propriety and necessity for giving the council power to suppress 'gaming' as a 'gambling-house.' They are simply different phases of the same evil; the one being an end, and the other a means." So that we think the first objection is not well taken.

2. The next question, however, presents more difficulty. The decisions as to what constitutes gaming have not been altogether uniform, but it is generally defined as "an agreement between two or more persons to risk money on a contest or chance of any kind, where one must be loser and the other gainer": *Bell v. State*, 5 Sneed, ²⁵⁴ 507, 509; 1 *Bouvier's Law Dictionary*; 8 *Am. & Eng. Ency of Law*, 1st ed., 1033; and a lottery is defined as a scheme for the "distribution of prizes by chance" (*Governors etc. v. American Art Union*, 7 N. Y. 228), or "a sort of gaming contract by which, for a valuable consideration, one may, by favor of the lot, obtain a prize of a value superior to the amount or value of that which he risks": 13 *Am. & Eng. Ency. of Law*, 1st ed., 1164; 1 *Bouvier's Law Dictionary*; *Bell v. State*, 5 Sneed, 507. Mr. Justice Grier says in *Phalin v. Virginia*, 8 How. 163: "Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple." And Mr. Justice Campbell says: "No other form of gambling operates as extensively in its dealings, or demoralizes so many people": *People v. Reilly*, 50 Mich. 384, 388, 45 *Am. Rep.* 47. As a result, there is now scarcely a state in the Union where lotteries are tolerated, and the mails are closed against them by act of Congress. That a lottery is a species of gaming is settled by authority, "if, indeed," as said by Barclay, C. J., in *Roselle v. Farmers' Bank*, 141 Mo. 42, 64 *Am. St. Rep.* 501, "authority be needed for so clear a proposition": *Stone v. Mississippi*, 101 U. S. 814; *Douglas v. Kentucky*, 168 U. S. 488, and authorities heretofore cited. It was accordingly held in *Bell v. State*, 5 Sneed, 507, and *Eubanks v. State*, 3 Heisk. 488, that the defendants were properly convicted of gaming upon proof that they had been conducting a lottery. It is true a distinction is made in the statutes of this and most of the states between certain ²⁵⁵ species of gaming and lotteries, and different punishments are provided for the different offenses. It is, therefore, sometimes held that conducting a lottery is not unlawful gaming, within the meaning of a local statute, as in *Temple v. Commonwealth*, 75 Va. 892. But we are dealing here with the simple question as to whether a lottery is gaming in a general sense, and whether it comes within the provisions of a municipal charter authorizing

the municipality to prevent and suppress gaming; and our conclusion is that under the authorities it must be so held.

3. The objection, however, that the ordinance in question is void because it assumes to overthrow the presumption of innocence, and put upon the defendant the burden of showing that his possession of lottery tickets is lawful or innocent, is well taken. Such an objection was held fatal to an ordinance quite identical in language with the one before us by the supreme court of California in the case of *In re Wong Hane*, 108 Cal. 680, 49 Am. St. Rep. 138, and the reasoning of the court in that case being, in our opinion, conclusive, renders unnecessary any further examination of the question by us. It follows, therefore, that the judgment of the court below must be affirmed, and it is so ordered.

LOTTERIES.—A MUNICIPAL ORDINANCE making it unlawful for a person to have a lottery ticket in his possession, unless that possession is shown to be innocent or for a legal purpose, is void, because it attempts to impose upon the accused the burden of proving his innocence: *In re Wong Hane*, 108 Cal. 680, 49 Am. St. Rep. 138. But see *Ford v. State*, 85 Md. 465, 60 Am. St. Rep. 837.

WHAT IS A LOTTERY is the subject of the monographic note to *Yellowstone Kit v. State*, 16 Am. St. Rep. 42-48.

USBORNE v. STEPHENSON.

[36 Oregon, 328.]

TRIAL—WITHDRAWING JUROR.—The practice of withdrawing a juror in a civil case for the purpose of postponing the trial does not obtain in Oregon.

TRIAL—WITHDRAWING JUROR.—The only cause for withdrawing a juror in a civil case is surprise on the trial, and a motion therefor cannot be based on matters happening prior thereto.

FACTORS—EVIDENCE OF NEGLIGENCE.—The question of negligence, in the disposal of goods received by a factor, held by him for a year and then consumed by fire, may be submitted to jury upon evidence of their market value at the time that they were received by him.

W. W. Thayer, H. St. Rayner, and E. Grimm, for the appellant.

G. H. Durham and Platt & Platt, for the respondent.

²³⁰ DEAN, J. 1. This is the first attempt, so far as we are advised, to invoke in this state the practice of withdrawing a

juror. There is but little satisfactory information to be obtained from the books in regard to the ancient practice, which used to be resorted to when a party was taken by surprise on a trial, of withdrawing a juror, and thus causing a mistrial, and, of necessity, a postponement of the case. It was originally confined to criminal cases, and seems to have been adopted for the purpose of avoiding a rule which once obtained, based largely upon a dictum of Lord Coke, that a jury sworn and charged in any criminal case could not be discharged without giving a verdict. To escape the effect of this rule, and yet apparently observe it to the letter, the courts resorted to the fiction of directing the clerk to call a juror out of the box, when it appeared that the prosecution was taken by surprise on the trial, whereupon the prosecution objected, or was supposed to object, to proceeding with the eleven jurors, and the trial went over for the term: 2 Hawkins' Pleas of the Crown, 319; 2 Hale's Pleas of the Crown, 294; Wedderburn's Case, Fost. 22; People v. Olcott, 2 Johns. Cas. 301, 1 Am. Dec. 168; United States v. Coolidge, 2 Gall. 363; Fed. Cas. No. 14,858. It was nothing more, however, than a means of obtaining a continuance or postponement of the trial after the jury had been impaneled and sworn. At first, it was thought this could be done only by the court ordering the discharge of one of the jurors, and then holding that, as the case could not be tried before the remaining eleven, it must be continued. But after the doctrine of Lord Coke had been repudiated, and it became the settled rule that it was within the power of the court, in a proper case, to discharge the jury after it had been impaneled and sworn, and continue the cause, the device of withdrawing a juror seems to have become practically obsolete, and but little, if any, reference to it as a substantive practice is to be hereafter found in the books. That it ever prevailed at common law in civil cases is very doubtful. No case has come under our observation in which it was resorted to in England. Indeed, the only reference we have been able to find to the question in the early authorities is a note to *Chedwick v. Hughes*, Carth. 464, in which it is stated that Lord Chief Justice Holt, in a case of perjury tried before him, said that it was the opinion of all the judges of England, upon debate between them, that in civil cases a juror cannot be withdrawn but by consent of all parties. And while the authority of this note underwent a critical examination in the subsequent case of *Sir John Wedderburn*, Fost. 28, from which its authority is ren-

dered rather questionable, it seems to be the only reference to the practice in civil cases. It was early ruled, however, in this country, by the courts of New York, after some hesitation, that a court may allow a juror to ³³³ be withdrawn in a civil case when necessary to save the plaintiff from the consequence of a fatal mistake in his testimony: *People v. Judges of New York*, 8 Cow. 127. And we believe it is still regarded as a proper practice in that state, and is open to either party: *Bishop's Code Pleading*, sec. 428; *Dillon v. Cockcroft*, 90 N. Y. 649; *Messenger v. Fourth Nat. Bank*, 48 How. Pr. 542. But, so far as we have been able to ascertain, it does not prevail elsewhere in this country, the same result being accomplished by a direct application to the court for a postponement of the trial: 4 *Ency. of Pl. & Pr.* 863. We are therefore of the opinion that the motion was properly denied on the ground that no such practice prevails in this state.

2. But, however that may be, whatever authorities there are on the subject all agree that the practice can be resorted to only when a party finds himself taken by surprise on the trial, and when further proceeding therewith would be productive of great hardship or manifest injustice to him. Mr. Bishop, in the section of his work on *Code Pleading* already cited, in speaking of the New York practice, says: "Instead of submitting to a nonsuit, the plaintiff, if he finds himself taken by surprise on the trial—as by the absence of a witness who has been in attendance, or by the unexpected presentation of evidence by his adversary which he is not prepared to meet, or by any accident which might render the further progress of the trial disastrous and unfair to him—may ask the court to withdraw a juror. The result of this application, if granted, will be to produce a mistrial; and the court may then continue the pending action, and set the trial over to a future day, when the plaintiff may come properly prepared to try the case afresh." Within this rule, the plaintiff's motion was likewise properly denied, because it is not based upon anything occurring at the trial, but upon matters happening long prior thereto, and which ³³³ could be, and were, properly submitted to the court in support of the motion for a continuance made before the jury was empaneled.

3. It is also claimed that the court erred in instructing the jury as to the law of negligence, and submitting to them the question as to whether the plaintiff had exercised due care and diligence in selling and disposing of the hops consigned to him

by the defendants, on the ground that there was no evidence to support such an instruction. The evidence on the part of the defendants tended to show that, at the time the hops were received by the plaintiff in London, they were worth in that market from twenty-four to twenty-five cents a pound, notwithstanding which he retained them in his possession for almost a year, when they were consumed by fire; and this was, in our opinion, sufficient, in the absence of any explanation whatever, to carry the case to the jury upon the question of negligence, and was sufficient upon which to base an instruction. This disposes of the questions made on the appeal, and, there being no error in the record, we have no alternative but to affirm the judgment.

The Withdrawal of a Juror.

The nature and effect of the proceeding commonly called withdrawing a juror are, we think, more clearly stated in the principal case than in any other coming within our observation. While the proceeding is often spoken of in the reports, the cases presenting any question necessarily involving it are by no means numerous. It is indeed remarkable that there should ever have been any such a proceeding, for the results accomplished by it are merely the discharging of a jury without any verdict and sometimes the continuance of the cause to some future period.

Both the effect of the withdrawal of a juror and the cases in which that proceeding might be employed have been the subjects of apparently conflicting statements, and hence have been involved in some doubt. That in England the withdrawal of a juror ordinarily implied that the litigation had terminated and would not be further pursued is evident from the decisions: *Gibbs v. Ralph*, 14 Mees. & W. 804. It is, nevertheless, clear, even in that country, that such result was not invariable, and that the plaintiff might show special circumstances sufficient to induce the court to again take up the cause and proceed with it to final judgment: *Bentley v. Dawes*, 10 Ex. 347; *Norburn v. Hulliam*, L. R. 5 Com. P. 129; 39 L. J. Com. P., N. S., 183; 22 L. T., N. S., 67; *Harries v. Thomas*, 2 Mees. & W. 32. In the United States, there is no doubt that the withdrawing of a juror did not entitle the defendant to any judgment either of nonsuit or otherwise: *Planer v. Smith*, 40 Wis. 31; and that the object of the proceeding, instead of being the discontinuance of the suit or a mere stay of proceedings therein, was to leave the plaintiff or the public prosecutor at liberty to proceed free from the embarrassment of there once having been a jury called and sworn to try the cause: *Commonwealth v. Bowden*, 9 Mass. 404; *People v. Olcott*, 2 Johns. Cas. 301, 1 Am. Dec. 168; *People v. Ellis*, 15 Wend. 371; *State v. Weaver*, 13 Ired. 203.

Some of the earlier decisions questioned the right to withdraw a juror in a criminal case, especially if the offense charged rose above the dignity of a misdemeanor: *Rex v. Jeffs*, 2 Strange, 984. Whatever doubts at any time existed on this subject were set at rest both in England and in this country by decisions affirming that the power of the court to permit the withdrawing of a juror extended to all criminal cases, irrespective of the character of the punishment to which the defendant, if convicted, might be subjected: *United States v. Coolidge*, 2 Gall. 364; *Commonwealth v. Purchase*, 2 Pick. 521, 13 Am. Dec. 452; *People v. Olcott*, 2 Johns. Cas. 301, 1 Am. Dec. 168; *People v. Ellis*, 15 Wend. 371.

The grounds upon which the withdrawing of a juror might be permitted cannot be stated with unquestioning confidence. If the trial could not result in a verdict, as where the jurors, after due deliberation, were unable to agree, there was no doubt that a juror might be withdrawn and the remaining jurors then dismissed, and the cause left for further trial at some subsequent date: *Commonwealth v. Bowden*, 9 Mass. 494; *People v. Olcott*, 2 Johns. Cas. 301, 1 Am. Dec. 168; *State v. Morrison*, 3 Dev. & B. 115. So, if the trial could not proceed for some cause, as where the defendant was taken ill, it might be discontinued by resorting to the device of withdrawing a juror: *Brown v. State*, 38 Tex. 482. Generally, it may be affirmed that whenever any circumstance arose in which, according to the more modern practice, the court, although the jury has been sworn and the trial begun, is justified in granting a continuance or in discharging the jury without a verdict, it is also authorized to reach the same end by directing or allowing the plaintiff or the prosecutor to withdraw a juror, as where a witness does not appear, and it is suspected that he has been tampered with: 1 Vent. 69; or he refuses to be sworn on the ground of conscientious scruples and there is hope that at some later day his testimony may be given: *United States v. Coolidge*, 2 Gall. 364; or he is subject to some temporary disqualification which may be removed in time for a later trial: *State v. Weaver*, 13 Ired. 203; or even on the failure of a witness to appear at the trial after having been subpoenaed: *People v. The Judges*, 8 Cow. 127. In one case it was shown that, after entering upon the trial of two persons under an indictment against them for assault and battery and receiving evidence on the part of the prosecution, the district attorney withdrew a juror, to enable him to bring the cause for trial on the day following against three defendants charged in the same indictment with the same crime. When on such succeeding day the cause was called for trial against all the accused, they objected on the ground that at the former trial at least two of them had been placed in jeopardy, and hence could not be further tried, but their objections were overruled: *People v. Ellis*, 15 Wend. 371. In a civil case the court may permit the plaintiff to withdraw a juror in every case where, under these circumstances, a continuance might properly be granted, as where the plaintiff is surprised by

the evidence given by his adversary and wishes an opportunity to rebut it: *Tinkham v. Heyworth*, 31 Ill. 519; *Miller v. Metzger*, 16 Ill. 390; *Messenger v. Fourth Nat. Bank*, 6 Daly, 190, 48 How. Pr. 542.

Perhaps the doubt at one time existing respecting the power of the court to allow the withdrawal of a juror in a criminal case arose from language employed by judges only for the purpose of showing that an accused was ordinarily, after his trial commenced, entitled to have it proceed to the end, and that neither the prosecutor nor the court had an arbitrary right to discharge the jury without a verdict. The power to withdraw a juror in a criminal case and afterward to put the defendant on trial "should not be lightly used, but confined as much as may be to cases of urgent necessity, where, by the act of God or by some sudden and unforeseen accident, it is impossible to proceed without manifest injustice to the public or the defendant himself": *People v. Barrett*, 2 Caines, 304, 2 Am. Dec. 239.

The withdrawing of a juror has been referred to as a proper proceeding at a comparatively recent day, even in a state which had discarded the common-law system of practice and adopted a code of civil procedure: *Dillon v. Cockcroft*, 90 N. Y. 649. In the federal courts it is said that, while a nonsuit may not be granted, the plaintiff may be permitted to accomplish the same result by withdrawing a juror and discontinuing his cause: *Wolcott v. Studebaker*, 34 Fed. Rep. 8.

RISCH v. WISEMAN.

[36 Oregon, 484.]

MINES AND MINING—VALIDITY OF LOCATION.—If, at the time of the location of a mining claim, notice is posted thereon and subsequently recorded, and the claim is marked by monuments, so that its boundaries can be readily ascertained, the location is valid.

MINES AND MINING—CLAIMS—PRESCRIPTIVE TITLE. If a person has held, occupied, and possessed mineral land under color of title, in pursuance of law and the local rules and regulations of the mining district for more than twenty years prior to an attempted adverse location, it is not then public mineral land, and such attempted location may be enjoined.

MINES AND MINING—PRESUMPTION.—The possessor of a mining claim in a mining district is presumed to be the owner thereof.

F. W. Benson, for the appellants.

A. M. Crawford and **W. R. Willis**, for the respondents.

⁴⁸⁵ BEAN, J. This is a suit to enjoin a trespass on a placer mining claim. The facts are that, in 1869, Moses Lee, F. G. Robinson, L. F. Robinson, G. W. Robinson, O. H. Robinson, and Joshua Fawcett located seven placer mining claims on Glees creek, in Douglas county, being a claim for each, and an additional one as a discovery claim, in accordance with the local laws and customs of the mining district in which they are situated. In May, 1872, these several claims passed into the possession of the plaintiff by purchase from G. Thompson, Amos Thompson, and James Thompson, since which time he has been in possession, claiming to be the owner, and has performed, or caused to be performed, labor thereon to the amount and value, as found by the trial court, of one hundred dollars each year. In June, 1896, the defendants, claiming the ground in question to be unoccupied mineral lands of the United States, entered upon and located the same in pursuance of the laws of Congress, and commenced work thereon; whereupon the plaintiff brought this suit, and, it resulting in a decree in his favor, the defendants appeal.

It is claimed that the plaintiff's possession did not prevent an entry and location by the defendants, because it was not founded upon a valid location. But the evidence shows that, at the time of the location of the several mining claims, notices were posted on each claim, and subsequently recorded in the record of the mining district; and the plaintiff testifies that the claims were marked on the ground by monuments, so that the boundaries thereof could be readily ascertained, and that Thompson, from whom he purchased, showed him the lines of the separate locations. We think, therefore, the court was clearly right in finding that the claims were located, and their boundaries marked on the ground, in accordance with law.

⁴⁸⁶ It is also contended that, because there is no evidence of the transfer of the title of the original locators to the plaintiff, he cannot maintain the suit. But the possessor of a mining claim in a mining district is presumed to be the owner thereof until the contrary appears, and that presumption is supported in this case by the fact that the plaintiff had held, occupied, and possessed the ground in question under color of title, in pursuance of law and the local rules and regulations of the mining district, for more than twenty years prior to the attempted location of the defendants, and therefore it was not public mineral land of the United States at the time of defendants' entry: *Gropper v. King*, 4 Mont. 367; *Cullacott v. Cash etc. Min. Co.*,

8 Colo. 179; Seymour v. Fisher, 16 Colo. 188. The decree of the court below is therefore affirmed.

MINING CLAIM—LOCATION OF.—The statute respecting the location of mining claims is construed liberally, and the sufficiency of the location and notice thereof, with reference to natural objects or permanent monuments, is simply a question of fact: Farmington etc. Co. v. Rhymney etc. Co., 20 Utah, 363, 77 Am. St. Rep. 913. See, too, Wilson v. Triumph etc. Min. Co., 19 Utah, 66, 75 Am. St. Rep. 718.

MINING CLAIM.—ACTUAL POSSESSION by a mining claimant is prima facie evidence of title: See the monographic note to McIntock v. Bryden, 63 Am. Dec. 105.

INDEPENDENT FORESTERS v. KELIHER.

[38 Oregon, 501.]

INSURANCE—BENEFIT SOCIETIES—VESTED RIGHTS. The right of a legally designated beneficiary to insurance under a certificate of membership in a benefit society becomes vested upon the death of the member, and no subsequent action of the society can change, nor affect, such rights.

INSURANCE—BENEFIT SOCIETIES—VESTED RIGHTS. Under a benefit certificate issued by a benevolent association the beneficiary therein usually has no vested interest until the death of the member, and until then the latter can change the beneficiary without his consent by complying with the by-laws and rules of the organization.

INSURANCE—BENEFIT SOCIETIES—CHANGE OF BENEFICIARY.—A member of a benevolent insurance association cannot change the beneficiary named in his certificate of membership except in the manner pointed out in the by-laws and rules of the association, and any material deviation therefrom invalidates the change or transfer.

INSURANCE—BENEFIT SOCIETIES—CHANGE OF BENEFICIARY.—If the by-laws of a benevolent insurance association require a member who wishes to change his beneficiary to file a written petition with his local branch of the association, stating certain facts, and directing the local secretary to send the petition and the certificate of membership to the grand secretary, who shall issue a new one, the failure of the member to file such petition or surrender his old certificate is an omission of material acts, and an alteration by the local secretary of the name of the beneficiary in the original certificate is ineffectual to change the beneficiary.

INSURANCE—BENEFIT SOCIETIES—CHANGE OF BENEFICIARY—WAIVER OF BY-LAWS.—The failure of the grand lodge of a benevolent insurance order to supply subordinate lodges with proper blank forms of petition for, or application for, change of beneficiaries, or the failure of a subordinate lodge to meet on a regular day when a petition for change of a beneficiary might have been considered, is not a waiver of the by-laws of the organization

as to change of beneficiaries, nor is it any excuse on the part of the insured member for failing to substantially comply with such by-laws.

M. L. Pipes, M. J. MacMahon, V. K. Strode, and H. E. McGinn, for the appellants.

M. G. Munly and J. B. & W. A. Cleland, for the respondents.

⁵⁰⁵ BEAN, J. 1. The rights of the parties to the fund in controversy must be determined by the condition of affairs at the time of Keliher's death. The right of a legally designated beneficiary under a certificate of the character now under consideration becomes vested upon the death of the member, and no subsequent action of the lodge or order can change or affect his rights: Bacon on Benefit Societies, sec. 255; McLaughlin v. McLaughlin, 104 Cal. 171, 43 Am. St. Rep. 83; Ireland v. Ireland, 42 Hun, 212; Keener v. Grand Lodge, 38 Mo. App. 543.

2. The only question to be determined, then, is whether Keliher complied with the rules of the order so as to effect the change of beneficiaries. If he did, then the guardians of his children are entitled to the fund; if not, Mrs. Keliher, his widow, is entitled to it, and the decree of the court should be reversed. It is the generally accepted ⁵⁰⁶ doctrine in ordinary life insurance that, unless the power of divestiture is reserved, the issue of the policy confers immediately a vested right in the beneficiary, which no subsequent act of either the insured or insurer, or both together, can impair without his consent. But it is entirely settled that under a benefit certificate issued by a benevolent association, such as the one now under consideration, the beneficiary therein usually has no vested interest until the death of the member, and up to that time the member may change the beneficiary without his consent: Bacon on Benefit Societies, sec. 306. But it is equally as well settled that such power must be executed in the manner pointed out by the policy and the by-laws and rules of the order, and any material deviation from the course prescribed will invalidate the transfer: 3 Am. & Eng. Ency. of Law, 2d ed., 993. Thus, where the rules provided that a member might at any time surrender his relief fund certificate, and a new one would be issued, payable to such person as he might direct, it was held that, where a member, without the knowledge of the association, inserted in the certificate, after the name of the originally designated beneficiary, the words, "and my wife, Mary," thus seeking to make

her a joint beneficiary, and then delivered the certificate to his wife, the attempted change was invalid, and vested no interest in the wife: *Thomas v. Thomas*, 131 N. Y. 205, 27 Am. St. Rep. 582. So, too, under a similar provision, it was held that an indorsement by a member on a benefit certificate of an order to pay the amount to a person other than the beneficiary named will not entitle the payee to receive it from the association: *Jinks v. Banner Lodge*, 139 Pa. St. 414. And again, under a like requirement, where a member, desiring to change his beneficiary, gave a written notice thereof to the officers of the subordinate lodge, saying that he surrendered the former certificate, ⁵⁰⁷ but did not do so, it was held that the original beneficiary was entitled to the fund, because the adoption of a particular method of changing a benefit certificate under the powers and within the limitations of the charter of the benevolent society is exclusive of all other methods: *Coleman v. Supreme Lodge*, 18 Mo. App. 189. See, also, *Holland v. Taylor*, 111 Ind. 121; *Harman v. Lewis*, 24 Fed. Rep. 97; *McLaughlin v. McLaughlin*, 104 Cal. 171, 43 Am. St. Rep. 83; *McCarthy v. Supreme Lodge*, 153 Mass. 314, 25 Am. St. Rep. 637; *American Legion of Honor v. Smith*, 45 N. J. Eq. 466.

There are, however, said to be three exceptions to the general rule requiring conformity to the regulations of the association in the matter of a change of beneficiaries, which are thus stated by Mr. Justice Brown, in *Supreme Conclave v. Cappella*, 41 Fed. Rep. 1: "1. If the society has waived a strict compliance with its own rules, and, in pursuance of a request of the insured to change his beneficiary, has issued a new certificate to him, the original beneficiary will not be heard to complain that the course indicated by the regulations was not pursued. 2. If it be beyond the power of the insured to comply literally with the regulations, a court of equity will treat the change as having been legally made." For example, where the certificate is lost, and cannot be surrendered by the member: *Grand Lodge v. Child*, 70 Mich. 163; *Grand Lodge v. Noll*, 90 Mich. 37, 30 Am. St. Rep. 419; or where it is retained by the original beneficiary, who refuses to surrender or deliver it up, as in *Supreme Conclave v. Cappella*, 41 Fed. Rep. 1, and *Grand Lodge v. Kohler*, 106 Mich. 121; *Isgrigg v. Schooley*, 125 Ind. 94. "3. If the assured has pursued the course pointed out by the laws of the association, and has done all in his ⁵⁰⁸ power to change the beneficiary, but, before the new certificate is actually issued, he dies, a court of equity will decree that to be done which

ought to be done, and act as though the certificate had been issued": *National Am. Assn. v. Kirgin*, 28 Mo. App. 80; *Luhrs v. Luhrs*, 123 N. Y. 367, 20 Am. St. Rep. 754; *Heydorf v. Conrack*, 7 Kan. App. 202. But we think the case under consideration does not fall within either of these exceptions. Manifestly not within the first, because the old certificate was never surrendered up, and a new one issued. It does not come within the second exception, because it was not beyond the power of the insured to substantially comply with the rules, which were: 1. The filing of a written petition setting forth fully and clearly the changes he desired to make; 2. Paying a fee of fifty cents; 3. Surrendering up his old benefit certificate; and 4. Furnishing satisfactory evidence that he, and not the beneficiary, had paid the assessments on account of such certificate.

If it be conceded that his offer to pay the fee to the secretary was a sufficient compliance with the second requirement, and his delivery of the original certificate to that officer for the purpose of having the desired change made was a sufficient compliance with the third, there was clearly no attempt on his part to comply with either the first or the fourth. He did not file, or endeavor to file, a written petition setting forth the changes he desired to make. The only writing was the memorandum prepared at the request of D. L. Povey for the use and information of his brother, the secretary of the lodge, and was destroyed as soon as it accomplished its purpose. The evidence shows—and about this there is no dispute—that it was not designed or intended as a petition to the court, or to be presented to or acted upon by the order. It is argued that, because the rules of the order require all ⁵⁰⁰ applications for change in beneficiaries to be made on blank forms provided by the supreme court, and it had failed and neglected to furnish the local court in Portland with such forms, Keliher was not required to make his petition in any particular form. This would probably be a sufficient excuse for not adopting a prescribed form, but it could be no excuse for not filing a petition of some kind, stating the changes he desired to make; so that, under the evidence in this case, there is no room for the contention that Keliher complied with the first requirement of the order. Nor did he furnish, or attempt to furnish, any evidence, satisfactory or otherwise, that he, and not the beneficiary, had paid the assessments on account of such certificate. This provision was no doubt inserted in the rules of this particular order because of the inequitable doctrine, which seems to

prevail, to some extent, at least, that a member of a benevolent association may change his beneficiary without his consent, even though he may have advanced the money to pay the assessments, and was designed to prevent a member from making such change, unless he could make it appear that he himself, and not the beneficiary, had been paying the assessments. No such showing was made, or attempted to be made, in this case, and, indeed, it probably could not have been, because it is in evidence that Mrs. Keliher, the beneficiary named in the certificate, paid a part, at least, of the assessments. We conclude, therefore, that because Keliher did not comply with the rules of the order governing the matter of changing beneficiaries, either in substance or in form, his attempted change was invalid, and the fund now in controversy belongs to his wife, the beneficiary named in the certificate.

3. In reaching this conclusion we have not overlooked the cases of *Manning v. A. O. U. W.*, 86 Ky. 136, 9 Am. St. Rep. 270, and *Splawn v. Chew*, 60 Tex. 510 532, holding, in effect, that the by-laws of a benevolent association providing the mode of changing the beneficiary named in a certificate issued by it are directory only, and for the benefit of the society, and, if it does not object to an attempted change, the original beneficiary cannot. These cases are manifestly not in harmony with the great weight of authority on the question, and do not, in our opinion, give effect to the terms and conditions of the contract as made. In case of an insurance contract made by a benevolent association the by-laws, rules, and regulations of the order, as well as the powers inherent in the very nature of such an association, become a part of the contract, and are as binding upon the parties as the provisions of any other contract. By becoming a member, and accepting a certificate, the party obligates himself to comply with the rules and requirements of the order, and agrees that payment shall be made, in case of his death, to the beneficiary named in his certificate, unless a change is made in the mode provided by the laws of the order. For many purposes, mutual benefit associations are insurance companies, and the certificates issued by them are regarded and treated as policies of insurance, and governed by the rules applicable to such contracts. There are, however, some well-recognized and important differences, and the principal one is the right of the assured to change the beneficiary without his consent. But this right exists because reserved in the contract, and inherent in the very nature and character of the associa-

tion. And, as said by the supreme court of Indiana in the case of *Holland v. Taylor*, 111 Ind. 121, 126: "As in either case the rights of the beneficiary are dependent upon and fixed by the contract between the assured and the company or association, there seems to be no reason why the assured should have any greater power to change the beneficiary in one case than in the other, ⁵¹¹ except as that power may be inherent in the nature of the association, or is reserved to him by the constitution, or by the laws of the association, or by the terms of the certificate. . . . By virtue of the by-laws and the certificate, which, as we have seen, constituted the contract between him and the Royal Arcanum, he had power to change the beneficiary. That same contract fixed the mode and manner in which that change might be made; and we think that, taking the by-laws and certificate together, the mode and manner of changing the beneficiary was fixed as definitely, and was as binding upon the assured, as was the right to make such change binding upon the association and the beneficiary. In other words, under the contract the assured had a right to change the beneficiary, provided he made the change in the manner provided in the contract."

So, in *Stephenson v. Stephenson*, 64 Iowa, 534, the court says: "The contract between the association and Robert Stephenson was that the former should pay the insurance to the persons named in the certificate of membership, unless he should change the name of the beneficiaries; and the manner in which this should be done formed a part of the contract of insurance. . . . Until the contemplated change was made on the books of the association, and a new certificate issued, the obligation to pay the beneficiary whose name appeared on the books of the association continued to exist. . . . Counsel for plaintiffs insist that, where a power is reserved, and no mode of executing it is provided, it may be executed by will. Possibly, this is so; but, whether so or not, it will be conceded for the purpose of this case. One difficulty in the application of such a rule to this case is that a mode of executing the reserved power is provided in the contract, and it is conceded that such a mode was not adopted. It was perfectly competent for the parties ⁵¹² to contract as they did, and the mode of executing the reserved power provided in the contract cannot be regarded as an idle ceremony, because substantially a new contract was made upon its being complied with, and thereby all doubt upon the part of the association as to who was the

beneficiary was removed. Because such mode was not adopted in this case creates the doubt we are called upon to solve. We therefore think the mode agreed upon in the contract, whereby the name of the beneficiary should be changed, was made a matter of substance, and should be complied with."

4. It is argued that, although it is the rule that a change of beneficiary must be made in the manner prescribed by the laws of the society, it is equally well settled that the society may waive compliance with the required form. But with this doctrine we have no concern in the present case, because there is no evidence that the society, either directly or indirectly, waived compliance with any of the requirements of the order. Neither Mr. G. W. Povey, the recording secretary, nor the other officers of the order in Portland whom Mr. Keliher consulted, had any authority to do so. They were but subordinate officers, whose duties were prescribed by the constitution and by-laws, of which Mr. Keliher had notice, not only because he was a member, but on account of the provisions of his certificate, and the further fact that when he joined the order he was furnished with a copy of its constitution and by-laws, and required to subscribe thereto.

It is claimed that the failure of the local society to hold the regular meeting, which should have been held, under the by-laws, between the date of the attempted change of the beneficiary by Mr. Keliher and his death, was a waiver of the provision requiring a petition for the change to be presented to the local court. There would probably be some force in this contention if Mr. Keliher had ⁵¹³ in fact filed a petition for a change of beneficiary; but, as we have already seen, he did not, and therefore the failure of the society to hold its regular meeting could in no way have affected his rights. The issue in this case is to be determined on the question as to whether Keliher himself performed the acts required of him, and, as he did not, there is no alternative but to reverse the decree, and award the fund to Mrs. Keliher, the party named in the benefit certificate.

ON MOTION FOR REHEARING.

PER CURIAM. 5. The petition for rehearing in this case is denied. The matters referred to therein did not escape the attention of the court. The ignorance of the officers of the local lodge of their duties, the failure of the installing officer of the society to instruct them therein, and the failure of the

order to furnish blank forms for a change of beneficiary, did not relieve Mr. Keliher from a substantial compliance with the rules of the order governing the matter of a change of beneficiaries, of which he had knowledge, because they were expressly made a part of his contract. As said in the original opinion: "The issue in this case is to be determined on the question as to whether Keliher himself performed the acts required of him, and, as he did not, there is no alternative but to reverse the decree, and award the fund to Mrs. Keliher, the party named in the benefit certificate."

Rehearing denied.

INSURANCE, MUTUAL BENEFIT—VESTED RIGHTS.—The beneficiary named in a certificate of membership in a mutual benefit society acquires no vested rights to the benefit to accrue upon the death of the member until such death occurs; when it does occur, his rights become vested: See the monographic note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 564.

INSURANCE, MUTUAL BENEFIT.—A CHANGE OF BENEFICIARIES in a benefit certificate must be effected in the manner prescribed by the laws of the society: See the monographic note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 561. Yet courts of equity recognize exceptions to this general principle: *Jory v. Supreme Council etc.*, 105 Cal. 20, 45 Am. St. Rep. 17; as where it is beyond the power of the insured literally to comply with such laws: *State v. Tomlinson*, 16 Ind. App. 662, 59 Am. St. Rep. 335; *Hall v. Allen*, 75 Miss. 175, 65 Am. St. Rep. 601.

CAPITAL LUMBERING COMPANY v. LEARNED.

[36 Oregon, 544.]

PLEADING AND PRACTICE.—An affirmative allegation of a complaint not specifically denied is admitted, and an affirmative allegation of the answer thereto inconsistent therewith is properly stricken out.

REPLEVIN—RETURN OF PROPERTY.—If plaintiff takes possession of property in replevin, and judgment is rendered for its return, plaintiff must seek defendant within a reasonable time and tender the property to him in the same condition in which it was received, to avoid liability on his bond, if the property is such that it can be readily moved; but if such course is difficult by reason of its bulky character, an offer to deliver it to the defendant is sufficient.

REPLEVIN—ACTION ON BOND—ESTOPPEL TO DENY VALUE.—The recital in a replevin bond of the value of the property is sufficient evidence of the value in an action on the bond, and estops the plaintiff and his sureties from denying such value.

CORPORATIONS—RIGHT TO SUE.—A corporation formed to manufacture lumber and erect buildings may take an assignment of a judgment and sue thereon.

CORPORATIONS CREATED FOR THE TRANSACTION OF CERTAIN SPECIFIED BUSINESS may invoke any legal or equitable remedy available to an individual under similar circumstances.

TRIAL—INSTRUCTIONS AS TO EFFECT OF WRITTEN INSTRUMENT.—If a written instrument sufficient in form and execution is in evidence, it is the duty of the court to instruct the jury as to its legal effect.

REPLEVIN—RETURN OF PROPERTY—TENDER, TO WHOM MADE.—A tender of property in satisfaction of a judgment in replevin for its return must be made to the holder of the judgment.

EVIDENCE—HARMLESS ERROR.—If immaterial facts are stated on direct examination, cross-examination in regard thereto cannot be prejudicial, and is harmless error.

REPLEVIN—ACTION ON BOND—ESTOPPEL TO DENY VALUE.—In an action against the surety in a replevin bond reciting the value of the property, he cannot deny its value though the judgment in the original action was not in the alternative, but only for the return of the property, and stating its value at the sum named in the bond.

REPLEVIN—ACTION ON BOND—DEFENSE.—It is no defense to an action on a replevin bond that it is signed by but one surety instead of two or more, as required by statute.

Holmes & Kellogg, for the appellants.

R. J. Fleming, for the respondent.

546 MOORE, J. 1. It is contended by defendants' counsel that the court erred in striking certain allegations from the answer, to the prejudice of their clients. It was alleged herein, in effect, that at the time said property was seized it was in the possession of Mrs. Learned, and that the sheriff, after levying thereon, left it upon her premises, situated about three miles east of Salem, where it has at all times since remained. It is argued that, the sheriff not having removed the property when he seized it, it was incumbent upon him, when it was adjudged that he was entitled thereto, to receive it at the same place and in the same condition that it was when his constructive possession was disturbed. The complaint alleged that the sheriff 547 made a valid levy upon the property and took the same into his possession; and this allegation, not being specifically denied in the answer, is admitted: Hill's Annotated Laws, sec. 94. The affirmative allegation of the answer which the court struck out being inconsistent with such admission, it was immaterial where the property was left by the sheriff upon its seizure.

2. The part of the answer which relates to where the property was to be found after its return was adjudged is important

only when the character of the property and the duty of the defendants with respect to its return are considered. When a return of personal property is adjudged in an action for its recovery, it is the duty of the plaintiff, if he has secured possession thereof pending the litigation, and would escape the penalty of his undertaking, to take active measures to redeliver it to the defendant within a reasonable time, in the same condition as when taken: *Cobbey on Replevin*, sec. 1182; *Parker v. Simonds*, 8 Met. 205; *Berry v. Hoeffner*, 56 Me. 170. This rule imposes upon the plaintiff in such case the duty of seeking the defendant in the action, and tendering the property to him, if it be readily capable of manual delivery; but if such a course is difficult, by reason of its bulky character, an offer to redeliver it to the defendant is all that the law enjoins. Thus, in an action for the possession of a steam-engine, boiler, engine-house, office, and hay scales, it was adjudged that the property be returned to the sheriff, who had levied thereon, but had not removed it from the place where it was then situated. The plaintiff offered to return it at the place where it was seized, but the sheriff refused to accept it, and thereafter commenced an action to recover its value, whereupon he was perpetually enjoined from enforcing the alternative judgment, the court holding that the property was of such a cumbrous nature as to render its removal inconvenient, ⁵⁴⁸ and that the plaintiff had done all that the law required of him in such cases: *Frey v. Drahos*, 10 Neb. 594. So, too, in *Gans v. Woolfolk*, 2 Mont. 458, a carpet containing six hundred yards, tacked to a floor, and not removed by the sheriff who seized it, was adjudged to be returned to him, and it was held that the carpet was so bulky as to render it necessary that the parties entitled to it should designate some convenient place to receive it, and, in the absence of such designation, the plaintiff could select a proper place for its delivery. Mr. Justice Blake, speaking for the court, in rendering the decision, says: "The carpet was a bulky and cumbersome article, and the respondents were not required to tender it, like money, to the appellants wherever found. They were obliged to deliver the property at some particular place. If the appellants neglected or refused to appoint the place, the respondents had the right to select it, with a reasonable regard for the convenience of the appellants, and there deliver the goods." In *McClellan v. Marshall*, 19 Iowa, 561, 87 Am. Dec. 454, plaintiff, having commenced an action in replevin, obtained the possession of a

mare, which, upon the trial, was adjudged to be returned to the defendant, and in complying therewith the mare was driven forty miles, and tendered to the plaintiff. In the case at bar, the property adjudged to be returned was of such character that it could be taken to the sheriff, and, this being so, it was incumbent upon Mrs. Learned to seek that officer at his place of business, and there tender the property to him in the same condition as when she received it: *Pittsburgh Nat. Bank v. Hall*, 107 Pa. St. 583. No error was committed, in our judgment, in striking out the allegation referred to from the answer.

3. It is contended that the court erred in striking out the denial in the answer that the chattels were of the value of one hundred and eighty-five dollars. It will be remembered that the complaint ⁵⁴⁹ in the replevin action alleged that the property was of that value, and that the undertaking executed to secure the possession of the property contained the same recital. Such averment was binding upon Mrs. Learned and estopped her from contradicting the value she placed thereon. The defendant Stump, though not nominally a party to the action, became such in effect by signing the undertaking, and is to be treated as in court during the litigation, and, not having objected to the proceedings, is concluded by the judgment rendered against his principal: *Cobbey on Replevin*, sec. 1313; 20 *Am. & Eng. Ency. of Law*, 1st ed., 1146; 1 *Greenleaf on Evidence*, sec. 523. Thus the recital in a replevin bond of the value of the property is sufficient evidence of the value in an action on the bond, and estops the plaintiff and his sureties from denying the same: *Wiseman v. Lynn*, 39 Ind. 250. To the same effect, see 1 *Brandt on Suretyship*, sec. 45; *Wells on Replevin*, sec. 453; *Swift v. Barnes*, 16 Pick. 194; *Tuck v. Moses*, 58 Me. 461; *Trimble v. State*, 4 Blackf. 435; *McFadden v. Fritz*, 110 Ind. 1; *Washington Ice Co. v. Webster*, 125 U. S. 426. No error was committed in striking out the denial.

4. The plaintiff having been incorporated to manufacture lumber and to erect buildings, it is contended by defendant's counsel that it had no authority to take an assignment of Knight's judgment, and hence no legal capacity to maintain an action of this character. The rule is well settled that, notwithstanding a corporation may have been created for the transaction of certain business, which is specified in the articles of incorporation, it may invoke any legal or equitable remedy which would be available to an individual under similar circumstances:

1 Morawetz on Private Corporations, sec. 357. The right of a corporation to sue is a necessary incident to its creation, and, whatever its business may be, any right of action which ⁵⁵⁰ necessarily arises therefrom will receive the consideration of a court to which it may apply for relief. To reach any other conclusion would be equivalent to holding that, while plaintiff, under its articles of incorporation, might lawfully engage in the manufacture of lumber, if it sold any of its product on credit to a person who failed to keep his engagements in relation thereto, it could have no remedy for the enforcement of the debt. The statement of such consequence is a sufficient answer to the contention.

5. An exception having been taken to the following instruction, it is contended by defendants' counsel that the court erred in giving it, viz.: "There is an issue, of course, as to whether or not the plaintiff, the Capital Lumbering Company, is the owner of this bond sued upon; and, so far as that is concerned, the written assignment in evidence is sufficient as an assignment of the bond. So I will instruct you, concerning that, that it is proven sufficiently that the plaintiff is the owner of the bond in suit." The bill of exceptions, in referring to the evidence which gave rise to the instruction complained of, contains the following recital: "Plaintiff, to further sustain the issue on its part, offered in evidence a written instrument, properly executed, and in apt and sufficient terms, as far as the form thereof is concerned; the same being an assignment to plaintiff by John Knight of the indemnifying bond above mentioned, and all causes of action in his favor against the defendants herein under said bond, and the judgment in favor of said Knight against the defendant Sarah T. Learned." This assignment being in writing, and its execution admitted, it was the duty of the court, as a matter of law, to instruct the jury as to its effect, and hence no error was committed in giving the instruction.

6. It is contended that the court erred in refusing to ⁵⁵¹ permit William Learned, a witness called by the defendants, to testify concerning an offer he made on behalf of Mrs. Learned to deliver the possession of said chattels to A. N. Moores, secretary of the plaintiff corporation. The bill of exceptions shows that this offer was made before the judgment was assigned by Knight. The plaintiff undoubtedly was the party beneficially interested in the judgment secured by Knight as its trustee, notwithstanding which it was the duty of the defendants to ten-

der the property to the latter as long as he was the holder of the judgment: Cobbey on Replevin, sec. 1181; Blatchford v. Boyden, 122 Ill. 657. No error was committed in refusing to permit the witness to answer the question.

7. The defendant Mrs. Learned, appearing as a witness in her own behalf, testified on direct examination that said property was in as good condition as it was when seized by Knight, and upon cross-examination, over her counsel's objection and exception, she was asked and answered the following: "Q. Has your husband not been using that property right along? A. He has used the hack. Q. Has he not broken the wheels of it several times? A. The hack has been in a runaway, and was injured, but the wheels have been repaired." It is insisted that this cross-examination was improper. This action is founded upon an alleged breach of the condition of the undertaking in the replevin action, and, if plaintiff was entitled to recover at all, it was because the defendants failed to return the property. This being so, the condition of the property at that or any other time was wholly immaterial. The defendant having testified, however, in her direct examination, as to the condition of the property, she could not have been prejudiced by the cross-examination upon that subject, to which the opposite party was entitled: Hill's Annotated Laws, sec. 837; Ah Doon v. Smith, ⁵³² 25 Or. 89; Sayers v. Allen, 25 Or. 211; Maxwell v. Bolles, 28 Or. 1; Oregon Pottery Co. v. Kern, 30 Or. 328.

8. The judgment rendered in the replevin action is for a return of the property only, and, while its value is determined, no alternative judgment therefor was given. In this condition of the judgment it is argued that the defendant Stump had the right, at the trial, to controvert the value of the property. In Marix v. Franke, 9 Kan. 132, it is held that an action can be maintained on an undertaking in replevin where the judgment has been given simply for the return of the property, and not for the recovery of its value in case delivery cannot be had. Mr. Justice Brewer, in deciding the case, says: "But a judgment simply for the return, though irregular, is valid. It cannot be questioned collaterally. It is conclusive so far as it goes. It can be enforced by execution. . . . If the judgment is valid, how are the sureties released from their promise to see that it is performed, simply because plaintiff has not taken all in his judgment he might have done?" See, upon this subject, Cobbey on Replevin, sec. 1313; Mitchum v. Stanton, 49

Cal. 302; *Mason v. Richards*, 12 Iowa, 73; *Whitney v. Lehmer*, 26 Ind. 503; *Jennison v. Haire*, 29 Mich. 207; *Sweeney v. Lomme*, 22 Wall. 208; *Putnam v. Webb*, 15 Or. 440. No error was committed in refusing to permit the defendant Stump to controvert the value of the property as found by the jury and adjudged by the court.

9. The statute provides that in actions for the recovery of personal property, the plaintiff, upon tendering an affidavit, and an undertaking executed by two or more sufficient sureties, may, upon indorsing a request to that effect upon the affidavit, obtain the possession of the property sought to be recovered. The undertaking in the case ⁵⁵³ at bar has but one surety, to wit, the defendant J. B. Stump, and it is insisted that for this reason he is not liable thereon. The point is without merit, however, for the rule is well settled that, while the party beneficially interested may move to set aside the proceedings in replevin by reason of the insufficiency of the undertaking in consequence of there being but one surety thereto, he may waive this right, and enforce the undertaking, though it is not such a bond as he had a right to demand: *Wolcott v. Mead*, 12 Met. 516; *Shaw v. Tobias*, 3 N. Y. 192; *Clafin v. Thayer*, 13 Gray, 459.

Having discovered no error in the bill of exceptions, it follows that the judgment is affirmed.

REPLEVIN.—GIVING A BOND for the return of replevied property precludes the defendant from asserting that less property was replevied than is described in the bond: *Knowles v. Lord*, 4 Whart. 500, 34 Am. Dec. 525.

CORPORATIONS HAVE THE SAME POWERS, within the scope of their authority, as individuals: *Deringer v. Deringer*, 5 Houst. 416, 1 Am. St. Rep. 150; *Killingsworth v. Portland Trust Co.*, 18 Or. 351, 17 Am. St. Rep. 737.

INSTRUCTIONS AS TO THE LEGAL EFFECT OF EVIDENCE may be asked for by either party in all cases: See the monographic note to *Strohn v. Detroit etc. R. R. Co.*, 99 Am. Dec. 127.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

FEIGENSPAN v. DRIESIGACKER.

[195 Pennsylvania State, 17.]

EXECUTIONS—SALES—FRAUDULENT CONVEYANCES—EJECTMENT.—After levy upon real property in possession of a debtor, he cannot, with a view to defeat the execution creditor, transfer the possession, even to the real owner, who must pursue his title by an action in ejectment against the purchaser at the sheriff's sale.

EXECUTIONS—SALES—FRAUDULENT CONVEYANCES. A mortgagor cannot, by confession of judgment in ejectment, deliver possession of a lot claimed to be mortgaged to the mortgagee, so as to defeat the claim of an execution creditor of such mortgagor who has already levied an execution on such lot.

A. W. Schalck and E. P. Leuschner, for the appellant.

G. J. Wadlinger, C. A. Snyder, and W. D. Seltzer, for the appellee.

19 McCOLLUM, J. The plaintiff brought this action of ejectment to obtain possession of lots Nos. 2 and 3 in block 74 on the map or plan of Tower City, as laid out for the owners in 1868. At the close of the evidence introduced on the trial of the case the court charged the jury that as to lot No. 3 their verdict should be for the plaintiff, and referred the evidence relating to the ownership of lot No. 2 to the jury, with instructions to carefully consider the same and ascertain therefrom the controlling facts respecting said ownership, and to render a verdict in accordance therewith. The verdict rendered as to lot No. 2 was in favor of the defendants, and the verdict rendered as to lot No. 3 was in favor of the plaintiff. Judgments were respectively entered on the verdicts.

Augusta Driesigacker, claiming title and a right to possession to lot No. 3, appealed from the judgment entered on the verdict in favor of the plaintiff. The basis of her claim is a loan of six hundred dollars to George W. Keilman on September 23, 1893, which she alleges was secured the same day by a mortgage on lot No. 3, although it appears on the face of the mortgage that it covered lot No. 8 in block 73 and not lot No. 3 in block 74. On June 28, 1895, it was agreed between Augusta Driesigacker and George W. Keilman that an amicable action of ejectment and confession of judgment therein be entered in favor of the plaintiff and against the defendant, which agreement was complied with on June 29, 1895, and included lot No. 3 in block 74. It was also provided in the agreement that a writ of *habere facias possessionem* should forthwith issue for the delivery of the possession of lot No. 3 in block 74 to Augusta Driesigacker, which writ was issued and executed on July 1, 1895.

In 1894 George W. Keilman, who was then "a bottler by trade," executed a bond in the sum of five hundred dollars to secure Christian Feigenspan for such credit as he might extend to Keilman in the business transactions between them. A judgment was entered on the bond and on April 5, 1895, Feigenspan issued a writ of *fieri facias* thereon and levied, *inter alia*, upon all the right, title, and interest of Keilman in lots Nos. 2 and 3 in block ²⁰ 74. On May 29, 1895, the property levied upon was condemned and a *venditioni exponas* was issued to No. 89 of July term, 1895, on which on July 6, 1895; the property was sold by the sheriff and purchased by Feigenspan, who received a sheriff's deed of the same on the 1st of September, 1895, and on April 20, 1896, instituted his action of ejectment for the possession of lots Nos. 2 and 3 in block 74. The results of the trial in the court below have been previously stated herein.

It is apparent that the summary proceedings agreed upon between Augusta Driesigacker and George W. Keilman were intended to prevent Feigenspan from obtaining possession of lot No. 3, and they evidently supposed they could accomplish their purpose by transferring possession of the lot to Augusta Driesigacker before the sale of it upon Feigenspan's judgment. The proceedings, however, were not available for the accomplishment of their purpose. "After a levy upon real property in possession of a debtor he cannot, with a view to defeat the creditor, transfer the possession even to the real owner, who

must pursue his title by an ejectment against the purchaser at the sheriff's sale": *Stahle v. Spohn*, 8 Serg. & R. 317. "In an ejectment by the vendee at sheriff's sale, the defendant, as whose property the premises were sold, cannot set up title under a lease taken by him from a third person, after the judgment under which the premises were sold was obtained and execution thereon levied on the premises in dispute": *Dunlap v. Cook*, 18 Pa. St. 454. See, also, *Eisenhart v. Slaymaker*, 14 Serg. & R. 153. Other cases in the same line as those referred to might be cited, but it is not deemed necessary to specifically refer to them.

We have carefully considered all the rulings which are specified in the assignments of error and have failed to discover in them any cause for reversing the judgment. The assignments are therefore dismissed.

Judgment affirmed.

A JUDGMENT GIVEN TO DELAY OR DEFRAUD CREDITORS is void as against them: *Mackie v. Cairns*, 5 Cow. 547, 15 Am. Dec. 477. However, a debtor in failing circumstances may prefer his creditor by a confession of judgment, provided he does not intend to delay or defraud his other creditors: *Sloan v. Hunter*, 56 S. C. 385, 76 Am. St. Rep. 551.

FRAUDULENT CONVEYANCE.—A PURCHASER AT A SHERIFF'S SALE takes all that the grantor owned in the property at the time of a prior conveyance thereof void as to creditors: *Spindler v. Atkinson*, 8 Md. 409, 56 Am. Dec. 755.

WALKER v. PHILADELPHIA.

[195 Pennsylvania State, 168.]

ACTIONS.—PARTIES, in the larger legal sense, are all persons having a right to control the proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from the decision, if any appeal lies.

HUSBAND AND WIFE—PARTIES.—The statutory right of action of a wife for a wrong done to her is her separate property, and her husband cannot control or interfere with the conduct of the suit or appeal from the decision therein.

JUDGMENTS—RES JUDICATA—HUSBAND AND WIFE.—If a wife, in an action to which her husband is merely a formal party, recovers judgment for personal injury to herself, and her husband brings another action to recover for the loss of the wife's services resulting from the same injury, the record of the first suit is not admissible in evidence, as conclusive of the defendant's negligence. Such record is *res inter alios acta*, and instead of being conclusive of such negligence, is wholly inadmissible.

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JUDGMENTS—RES JUDICATA—PARTIES.—No party is, as a general rule, bound in a subsequent suit by a judgment, unless the adverse party, now seeking to secure the benefit of the former adjudication, would have been prejudiced by it if it had been determined the other way. In order to come within the rule as to res judicata, the first judgment must have been binding on both parties to the second action.

NEGLIGENCE—EVIDENCE—VALUE OF SERVICES AS NURSE.—In an action by a husband to recover for the loss of his wife's services resulting from a personal injury to her, evidence of his daughter as to what she was earning in her employment given up by her in order to nurse her mother after such injury is inadmissible. The liability of the defendant in such case is the ordinary wages of such attendance.

HUSBAND AND WIFE—SEPARATE ACTIONS FOR NEGLIGENCE—ESTOPPEL—STATUTE OF LIMITATIONS.—If a wife maintains her statutory action and recovers judgment for personal injury, and a settlement is effected by which the defendant withdraws its motion for a new trial, and as part of the consideration for prompt payment without further contest, the husband's right of action for the loss of his wife's services resulting from such injury is barred by the issue of a writ and its discontinuance and the settlement of the action of record, the husband is thereby estopped from maintaining an action, even by leave of court, especially after his right is barred by limitation. In such case the action of the court in striking off such discontinuance and permitting him to sue is improvident and erroneous.

J. L. Kinsey, city solicitor, E. S. Miller, assistant city solicitor, and L. Finletter, for the appellant.

J. G. Gordon and H. A. Mackey, for the appellee.

173 MITCHELL, J. 1. The first question to be considered is the effect of the verdict and judgment previously obtained against the city by the plaintiff's wife. The record was admitted and held conclusive as to the city's negligence in the accident out of which the present action arises. This was error. There was no identity either of parties or of rights. The first action was by husband and wife for injuries to the wife. The husband was only a nominal party and since the act of 1887 need not have been joined even for formality. "Parties in the larger legal sense are all persons having a right to control the proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from the decision if any appeal lies": 1 Greenleaf on Evidence, sec. 535. The right of the wife in the first action, being for a tort done to her, was her separate property by the express words of the act of June 3, 1887 (Pub. Laws, 333), and the husband could not have controlled or interfered with the conduct of the suit or appealed from the result. In *Fearn v. West Jersey Ferry Co.*, 143 Pa. St. 123, a closely analogous case, our brother McCollum said: "It is con-

tended by the appellant that the injuries for which these suits were brought were received at the same time and place, and were attributable to the same cause, to wit, the neglect of the defendant company to keep its boats in a reasonably safe condition for the ingress and egress of its passengers. Assuming that the claim of the appellant is correct, it does not follow that a deposition taken in one action is admissible as evidence in the other. The actions are not between the same parties, although we have the same defendant in each. The fact that the plaintiff in the first action was the wife of the plaintiff in this action, or that she is now his widow and administratrix, can make no difference in the rule which allows testimony taken in one action to be given in evidence on the trial of another which involves the same subject matter and is between the same parties or their privies. The joinder of the husband in the former suit was merely formal, and it did not ¹⁷⁴ give him control of or an interest in it. It was the wife's claim that was litigated; the judgment was obtained in her right, and it was exclusively hers. Identity of subject matter, in whole or in part, and identity of parties in interest must unite, to render a deposition in one case admissible in another."

In order to come within the rule as to *res adjudicata* the first judgment must have been binding on both parties to the second action. "No party is, as a general rule, bound in a subsequent proceeding by a judgment, unless the adverse party, now seeking to secure the benefit of the former adjudication, would have been prejudiced by it if it had been determined the other way": Freeman on Judgments, sec. 159. If the wife's action had failed for want of evidence of the city's negligence, and there had been a verdict for defendant, the plaintiff, having been only a nominal party with no control over that action, would not have been barred from his right to prove negligence in his own suit. As he would not have been prejudiced by one result he cannot claim the benefit of the other.

Nor was his claim privy to or derived from the right of the wife. His action now is on his own common-law right to compensation for the loss of his wife's services. No settlement or disposition of her claim could affect his without his consent. Indeed, it was on this ground that the court below struck off the entry of discontinuance.

No exact precedent has been found in this state, though *Fearn v. West Jersey Ferry Co.*, 143 Pa. St. 122, already cited, is closely analogous, and the reasoning entirely in harmony

with our present views. In other states the exact precedents are few and not harmonious. We are thus left to decide upon general principles, and on these we are clearly of opinion that the record of the wife's action was *res inter alios acta*, and so far from being conclusive evidence of the city's negligence it was not admissible at all.

2. There was also error on the subject of damages in permitting plaintiff's daughter to testify to what she was earning in her employment as a dressmaker, which she gave up to wait on her mother after the injury. Conceding, though the sufficiency of the evidence is questionable, that plaintiff had proved an express contract to pay his daughter for services which as ¹⁷⁵ a member of the family were *prima facie* presumed to be rendered gratuitously (*Goodhart v. Pennsylvania R. R. Co.*, 177 Pa. St. 1, 55 Am. St. Rep. 705), yet the measure of compensation for which the city could be held liable was the ordinary wages of such attendance. What the daughter had earned or could earn at her independent trade was wholly irrelevant and misleading.

3. On the whole case it is clear that the plaintiff cannot recover at all. The wife having obtained a verdict, a settlement was effected by which the city withdrew its motion for a new trial, the amount of the verdict was reduced, and as part of the consideration for prompt payment by the city without further contest the husband's right of action was barred by the issue of a writ and its discontinuance and settlement of record. If the plaintiff authorized that suit, he is bound by the discontinuance as part of the settlement of the suit by his wife. If he did not authorize it, then no suit was brought within the period of limitation, and he could not, nor could the court by striking off the discontinuance permit him to authorize or ratify it *nunc pro tunc* after the statute had closed upon his right of action. A distinction is sought to be made, and the daughter was brought forward to show that acting for her father she authorized counsel to bring the suit but not to settle or discontinue it. She testified: "He [the attorney] was to bring my mother's case first. If it was decided in her favor my father's was to be brought afterward. . . . Q. You left it all to him? A. Yes, sir." This is all there is of it and the proof falls far short of the offer, but taking it in its fullest and most favorable aspect for the plaintiff, it goes only to show that the time of bringing the father's suit was to be in the discretion of counsel after a favorable result in the first action. And this dis-

cretion never was exercised. A suit was brought and immediately discontinued of record, but it was as a part of the settlement of the wife's action. It was not brought as an assertion of the plaintiff's right and effort to recover upon it, nor was any other suit ever brought by that counsel. Suit was subsequently brought by other counsel on the instruction of plaintiff, and this discontinued suit was found to stand in the way. Plaintiff then, for the first time, sought to avail himself of the action of his first counsel in bringing this suit. He could only do so cum onere. If he adopted it at all he must adopt it as it really ¹⁷⁶ was, as part of the settlement of this wife's verdict. To allow him to use it as an independent suit upon his right of action for loss of his wife's services would be not only in direct disregard of the facts of the case, but to allow him to perpetrate a fraud on the defendant. He could not himself distort an action brought solely for one purpose to another and directly repugnant one, nor could the court authorize him to do so. The order striking off the discontinuance was improvidently and erroneously made, and the statutory bar having become complete, the striking off the discontinuance could not even operate as an available new writ. The defendant's first point should have been affirmed and the verdict directed for defendant.

Judgment reversed and now judgment entered for defendant.

THE TERM "PARTIES" INCLUDES all who are directly interested in the subject matter, and who have a right to make a defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment: *Ashton v. Rochester*, 133 N. Y. 187, 28 Am. St. Rep. 619.

RES ADJUDICATA.—A RECOVERY BY A WIFE for personal injury to herself, her husband not being a party to the action nor interested therein, is not res judicata as to his right to recover for the damages resulting to him from such injury to her: *Selleck v. Janesville*, 104 Wis. 570, 76 Am. St. Rep. 892.

PERSONAL INJURY TO WIFE—MEASURE OF RECOVERY. A husband may recover for the value of his own necessary services in attendance upon his wife, who has received personal injury at the hands of another, but such recovery must be limited to the amount for which he could have procured such attendance from others: *Selleck v. Janesville*, 104 Wis. 570, 76 Am. St. Rep. 892.

FOOTE v. AMERICAN PRODUCT COMPANY.

[195 Pennsylvania State, 190.]

TRIAL—INSTRUCTIONS.—If binding instructions are given to the jury, or where the court refuses to take off a compulsory nonsuit, the reason for such action should be at least briefly stated, as an aid to counsel as well as to the appellate court.

NEGLIGENCE—BICYCLES—LAW OF ROAD.—The rights and duties of a person on a bicycle and a driver of a wagon on the highways in a city are reciprocal; each is required to obey the law of the road, and conform to its requirements by passing to the right.

LAW OF ROAD.—By the law and custom of the land, it is the duty of persons traveling in wagons or other vehicles meeting each other on the public road to pass to the right.

LAW OF ROAD—BICYCLES.—The fact that a person is riding a bicycle does not deprive him of the protection of the law of the road, but requires the driver of a wagon to accord him the same privileges and rights in the highway as though he were using a carriage.

NEGLIGENCE—LAW OF ROAD—BICYCLES.—If a person riding a bicycle on the right-hand side of the street, at an ordinary rate of speed, and ringing his bell as he approaches a crossing, is there met by a wagon driven at a moderate rate of speed around the corner in such way as to show an intention to drive along the street on the same side as the bicyclist, and the latter, in attempting to prevent a collision and to dismount, is thrown under the wagon and injured, the question of the negligence of the parties is for the jury to determine under proper instructions, and binding instructions for the defendant is error.

NEGLIGENCE—LAW OF ROAD—BICYCLES.—If a bicyclist, observing the law of the road, acts on the assumption that the driver of a wagon will conform thereto, and, without any fault of the former, he is placed in a dangerous position by the negligence or carelessness of the driver of the wagon, he cannot be held to the same strict measure of care as under ordinary circumstances in attempting to relieve himself from the perilous situation.

NEGLIGENCE—EVIDENCE—LAW OF ROAD—BICYCLES. In an action by a bicyclist against the owner of a wagon to recover for personal injury suffered in a collision, while the bicyclist was conforming to the law of the road, and the driver of the wagon was not, a municipal ordinance requiring all vehicles, including bicycles, to keep to the right is admissible in evidence, not as proof of negligence, but to be considered with other evidence in ascertaining whether the defendant is guilty of negligence.

R. C. Dale, for the appellants.

M. W. Sloan, for the appellee.

190 MESTREZAT, J. The evidence on the part of the plaintiffs tended to establish the following facts: On the afternoon of September 1, 1897, Benjamin Foote, one of the plaintiffs, a boy of twelve years, was riding a bicycle on the east

side of Seventeenth street, in the city of Philadelphia. He had been on an errand for his mother, and came from Pine street and was going north toward Spruce street. Edward H. Cloud, Esq., came out of De Lancey street, which is a short distance south of Spruce street, on a bicycle, and followed him on the east side of the street at a distance of fifty or seventy-five feet. As the boy neared the foot crossing at the corner of Seventeenth and Spruce streets he met the garbage wagon of the defendant, and was struck by it, or was thrown by trying to save himself in dismounting, and fell with his left foot under the rear wheel of the wagon. The wheel passed over his foot, inflicting severe injuries. The boy was riding at an ordinary rate of speed and rang his bell as he approached Spruce street. The garbage wagon was a four-wheeled vehicle, drawn by one horse. It came west on Spruce street and turned south at the southeast corner of Spruce and Seventeenth streets, "hugging the curb," and so close thereto that the boy could not pass between it and the curb. The wagon made an angle of about forty-five degrees with the east curb line of Seventeenth street, and the horse was more nearly parallel with the street, the apparent intention of the driver being to proceed south along the east side of Seventeenth street. At or near the street crossing the boy first saw the wagon, which was then directly in front of him, and he immediately began to check his speed by back-pedaling. In thus attempting to prevent a ¹⁹⁸ collision with the wagon and to dismount, the right pedal of his bicycle struck the curb and he was thrown to the left under the left rear wheel of the wagon. When the wagon turned into Seventeenth street the horse was going at a moderate rate and was stopped a few feet from the place of the accident. When the boy first saw the wagon the rear wheel was not clear of the Seventeenth street curb, but when it ran over his foot it was about two feet from the curb.

An ordinance of the city of Philadelphia, approved February 2, 1897, provides that "all persons driving or riding upon the streets or highways of the city, whether on horseback, in carriages, wagons, or other vehicles, or upon bicycles, tricycles, or other mechanical contrivances, shall at all times drive on the road upon the right side of the street or highway, and shall pass all vehicles traveling in the opposite direction by driving or riding to the right of such vehicle, or pass all vehicles traveling in the same direction by driving or riding to the left of such vehicles."

At the conclusion of the plaintiffs' testimony the court directed the jury to render a verdict for the defendant. No reasons were assigned for the action of the court, and the record is equally silent as to the reason for the refusal of a new trial. Where binding instructions are given to the jury, or where the court refuses to take off a compulsory nonsuit, the reasons for the action of the court should be at least briefly stated. This, very frequently, would prevent an appeal by enabling the counsel to see the correctness of the court's position, and if an appeal should be taken, it would aid very materially the appellate court as well as counsel in an intelligent review of the case.

The action of the court in giving binding instructions to the jury to find for the defendant can only be sustained upon the ground that the evidence failed to disclose negligence on the part of the driver of the wagon, or that it established negligence on the part of the boy.

The rights and duties of the boy and the driver of the garbage wagon on the highways of the city were reciprocal. Each was required to obey the law of the road and to conform to its requirements. "By the law and the custom of the land it is the duty of persons traveling in wagons or other vehicles meeting ¹⁹⁴ each other on the public road to pass on the right-hand side of the road. . . . This law or custom applies to, and is intended to regulate the duty and conduct of, those traveling on the road as between themselves": *Grier v. Sampson*, 27 Pa. St. 188. The evidence in the case at bar did not justify the court in declaring as a matter of law that the boy was within the well-recognized exception to the rule stated that a light vehicle or bicycle must give way to a heavily-laden wagon. There was no apparent necessity here for the application of this exception to the rule. Under the act of April 23, 1889, the boy had the same right and was subjected to the same restrictions in the use of his bicycle as a person using a carriage drawn by a horse. That he was riding the bicycle, therefore, did not deprive him of the protection of the law of the road, but required the driver of the garbage wagon to accord to him the same privileges and rights in the street as though he were using a carriage.

In passing north along the east side of Seventeenth street the boy was where he had a right to be and where, if traveling on the street in that direction, the law of the road, as well as the city ordinance, required him to be. When the collision oc-

curred the driver was turning his wagon around the southeast corner of Spruce and Seventeenth streets, and the plaintiffs claim that it was with the intention of going south on the east side of the street. When no one was approaching with a desire to pass him with a vehicle, the driver had the right to use any part of the street not occupied by another, yet when he turned abruptly on Seventeenth street in the manner shown by the testimony he was taking the chance of a collision with other travelers going north on that street, whose rights at that place were superior to his.

Whether the boy could have seen the wagon on the street in time to prevent the collision, as claimed by the defendant, was not for the court to determine under the circumstances shown by the testimony. Nor was it for the court to say that his effort to free himself from his danger was a negligent act contributing to his injury. Even if he saw the wagon on Spruce street as he approached the corner, unless he could also see that it was too close to the curb to permit him to pass, he had a right to assume that the driver, if he did turn on Seventeenth street, would keep to the right so that he could pass between the wagon ¹⁹⁵ and the curb. This was the rule of the road, and he had a right to act on the expectation that the driver would observe it: *Baker v. Fehr*, 97 Pa. St. 70. If, acting on this assumption, without any fault on his part, the boy was placed in a dangerous position by the negligence or carelessness of the driver, he will not be held to the same strict measure of care as under ordinary circumstances in attempting to relieve himself from a perilous situation.

We are of opinion that the case should have been submitted to the jury with proper instructions as to the rights and duties of the parties at the time of the accident. The facts developed by the plaintiffs' evidence did not warrant the court in saying as a matter of law that there was no negligence on the part of the defendant or that the boy's negligence contributed to his injuries. The facts of the case and the inferences to be drawn therefrom were clearly for the jury.

The objection by the defendant to the city ordinance offered in evidence by the plaintiffs was not well taken. While the ordinance in itself was not evidence of negligence, it may be considered with other evidence in ascertaining whether the defendant was guilty of negligence: *Lederman v. Pennsylvania R. R. Co.*, 165 Pa. St. 118, 44 Am. St. Rep. 644.

The judgment is reversed and a venire facias de novo is awarded.

THE LAW OF THE ROAD requires persons meeting on a highway to bear to the right: See the monographic note to *Riepe v. Elting*, 48 Am. St. Rep. 368-370.

LAW OF THE ROAD.—A PERSON RIDING A BICYCLE on a public highway has the same rights in so doing as persons on horseback or using other vehicles thereon: *Thompson v. Dodge*, 58 Minn. 555, 49 Am. St. Rep. 533. He is placed upon an equality with persons riding or driving other vehicles, and is governed by the same rules. They have no rights superior to his: See the monographic note to *Riepe v. Elting*, 48 Am. St. Rep. 377, 378.

LAW OF THE ROAD.—A PERSON MAY ASSUME, while lawfully using a highway, that a fellow traveler will exercise ordinary care and prudence, and may govern his own conduct in determining his use of the road accordingly: See the monographic note to *Riepe v. Elting*, 48 Am. St. Rep. 372.

WENGER v. PHILLIPS.

[195 Pennsylvania State, 214.]

MALICIOUS PROSECUTION—LEGAL ADVICE—STATUTE OF LIMITATIONS.—An action for malicious prosecution cannot be maintained if it appears that such prosecution was commenced upon the advice of the district attorney, sought in good faith, and based on a full disclosure of all of the facts known to the prosecutor. The fact that the binding over was after the prosecution was barred by limitation does not make the prosecutor liable unless he persisted in such prosecution after he knew that it was barred.

MALICIOUS PROSECUTION—USE OF CRIMINAL PROCESS—PROBABLE CAUSE—EVIDENCE.—Proof that criminal process has been made use of as a means to collect a debt is not conclusive in establishing want of probable cause and the existence of malice in an action of malicious prosecution. It is *prima facie* only, and while sufficient to shift the burden of proof to the defendant, it may be rebutted by other proof.

H. F. Eshleman, W. M. Hayes, A. E. Burkholder, and J. C. Hayes, for the appellant.

J. F. E. Hause and J. H. Baldwin, for the appellee.

219 FELL, J. There is no ground for the complaint that the charge is inadequate and misleading. It contains a full and accurate statement of the law applicable to an action for malicious prosecution, and the questions of fact raised by the conflicting testimony were clearly and fairly presented to the jury.

The prosecution was commenced by advice of the district attorney. That this advice was sought in good faith and was based upon a full disclosure to him of all the facts known to

the prosecutor was not controverted. That the binding over was after the prosecution was barred by the statute of limitations did not make the defendant liable unless it appeared that he had persisted in the prosecution after he knew it was barred. This did not appear, and there was nothing from which his knowledge could be inferred. The district attorney, when consulted, asked whether two years from the date of the commission of the offense had elapsed, but he made no explanation of the requirements of the statute, and did not inform the defendant that it was necessary that an indictment should be found within two years.

The plaintiff's first and second points for charge were properly refused for the reason that there was no evidence to sustain them. They might well have been refused for the reason that if the facts stated therein had been sustained by proof an ²²⁰ instruction for the plaintiff would not have been warranted. Proof that a criminal process had been made use of as a means for the collection of a debt is not conclusive in establishing the want of probable cause and the existence of malice. It is prima facie only, and while sufficient to shift the burden of proof to the defendant it may be rebutted by other proofs: *Prough v. Entriken*, 11 Pa. St. 81; *Schmidt v. Weidman*, 63 Pa. St. 173.

The judgment is affirmed.

MALICIOUS PROSECUTION—ADVICE OF COUNSEL.—If, in an action for malicious prosecution, it is shown that the defendant, before the commencement of the prosecution, made a full and fair statement of the facts to counsel, and was advised that they constituted a criminal offense, and, believing and relying upon such advice, commenced the criminal proceeding, he is not guilty of malicious prosecution: *Tryon v. Pingree*, 112 Mich. 338, 67 Am. St. Rep. 398. See, further, the monographic note to *Ross v. Hixon*, 26 Am. St. Rep. 143-147.

IN AN ACTION FOR MALICIOUS PROSECUTION, EVIDENCE that the prosecution was to forward some private purpose of the prosecutor, as to obtain the payment of a debt, is admissible to show the absence of probable cause and to create an inference of malice: See the monographic note to *Ross v. Hixon*, 26 Am. St. Rep. 155, 156.

FERGUSON v. GRETH.

[195 Pennsylvania State, 272.]

BANKRUPTCY—PREFERENCES.—A judgment on a warrant of attorney to confess it, entered within four months of the filing of a petition in bankruptcy, is, regardless of the date of the warrant of attorney, within the meaning of a bankruptcy statute declaring that the holder cannot avail himself of a lien obtained by a judgment by confession "begun" against a person within four months before the filing of his petition in bankruptcy, if the lien was obtained while such person was insolvent. In such case it is not the date of the warrant of attorney authorizing the entry of judgment, but the date on which the judgment was actually entered that fixes the time from which the four months' period begins to run.

D. N. Schaeffer, for the appellant.

L. Hiester, for the appellee.

¶ **PER CURIAM.** In this case a petition in bankruptcy against the defendant Greth was presented on April 3, 1899, upon which a contest arose as to the fact of his insolvency which was followed by an adjudication of bankruptcy on October 17, 1899. The appellant's judgments were entered against him on January 10, 1899, and as that date was within four months of the time when the petition was filed, the case was brought directly within the express words of the sixty-seventh section of the present bankrupt law. It is very clearly and forcibly shown in the opinion of the learned court below that it is not the date of the warrants of attorney authorizing the entry of judgment, but the date on which the judgments are actually entered, that fixes the time from which the four months' period begins to run. We do not see any escape from the conclusion thus reached, and we therefore find that there was no error in the order making absolute the rule to show cause why the fund in court should not be paid to the trustee in bankruptcy.

Order affirmed at the cost of the appellant.

LIMITATION AGAINST A JUDGMENT does not begin to run until its entry: *Crim v. Kessing*, 89 Cal. 478, 23 Am. St. Rep. 491.

KAUFMAN v. BURGERT.

[195 Pennsylvania State, 274.]

WILLS—CONSTRUCTION—REPUGNANT CONDITIONS.—

If an estate in fee is devised, and the testator attempts by a condition in the will to prevent its alienation except by will, the estate passes in fee to the devisee free of such condition, as well as free of a condition in the will against liability for the devisee's debts. Such conditions are repugnant to the estate granted and void.

I. P. Rothermel, for the appellant.

W. K. Stevens, for the appellee.

²⁷⁵ GREEN, C. J. There cannot be the least doubt that the estate given by the ²⁷⁶ will of Daniel B. Kaufman to his son, Cyrus William Kaufman, in the land in question is an absolute estate in fee simple. The devise is in the following words: "I give and devise unto my son Cyrus William, his heirs and assigns forever, from and after the expiration of eighteen years from the date hereof, the farm on which I now live situate in Maiden creek Township, aforesaid, bounded as follows," etc. The payment of some legacies was imposed, and a subjection to some reservations, but none of these affect the character or extent of the devise, or of the estate thereby created. In the later clause of the will, which is supposed to have diminished the estate below a fee simple, the testator directed as follows: "It is my will and I direct that the farm devised to my son Cyrus William shall not be liable for any debts of his contraction, nor shall the same be encumbered or sold for any of his liabilities, nor shall my son sell or dispose of any part thereof, but the same shall go and vest in his heirs unless he shall devise the same by his last will and testament, which he is authorized and empowered hereby to do." It is very clear that the estate devised was an estate in fee simple with power to dispose of the same by will but not by deed. In other words, an attempt was made to confer a fee simple estate shorn of a power to alienate except by will. The authorities are quite clear that in such case the estate in fee simple passes to the devisee and the condition against alienation is void.

The case of *Jaureche v. Proctor*, 48 Pa. St. 466, was almost precisely like this. Woodward, C. J., delivering the opinion, said: "Such, then, is this will, the devise of an absolute estate to the wife, with all the rights of a tenant in fee, except the power of alienation, and with direction that what may

remain of the property at her death may be equally divided among the children. Now, a power of alienation is necessarily and inseparably incident to an estate in fee, and, therefore, if lands be devised to A and his heirs upon condition that he shall not alien, the condition is void: 4 Kent's Commentaries, 131; *McWilliams v. Nisley*, 2 Serg. & R. 513, 7 Am. Dec. 654; *Schermerhorn v. Negus*, 1 Denio, 448. . . . A partial restriction, such as not to alien to a particular person or for a limited time, may be supported, but a general restraint of alienation, when annexed to an absolute estate, is void, upon the ²⁷⁷ familiar principle that conditions repugnant to the estate to which they are annexed bind not."

In the foregoing case the restraint was upon the power of alienation; in the one following it was upon the liability of the estate devised, for the debts of the devisee: *Keyser's Appeal*, 57 Pa. St. 236, in which we held that a devise in fee with condition that it shall not be liable for the debts of the devisee is as repugnant to the estate devised as a condition not to alien. In the opinion of the lower court by Sharswood, J., which was adopted by this court, it was said: "But we have here the case of a trust of the fee giving the cestui que trust the beneficial estate with a provision that it shall not be liable to the debts of the cestui que trust. Such a provision, if there had been no trust, would have been as repugnant to the estate devised as a condition not to alien. . . . It seems to me that the mere interposition of a dry trustee will not enable a testator to give a beneficial estate in fee simple with all the incidents of ownership, except that of liability for debts."

In the second clause of the will, above cited, and the one which contains the attempted restrictions, the very words which make the estate of the devisee a fee simple are again repeated, as follows: "But the same shall go and vest in his heirs, unless he shall devise the same," etc. So that it cannot be argued that the case comes within the line of decisions that where any estate in fee is given, yet by subsequent provisions of the will an intent is manifested to reduce the fee to a less estate, the fee shall not pass. These are the cases cited for the appellant, but it is quite clear that they cannot apply, because in the subsequent clause in this will, the very clause which imposes the restrictions, it is expressly again declared that the estate shall go to his heirs, thus repeating the words that declare a purpose to make the estate of the devisee a fee simple estate. The same principles are again announced and enforced

in the case of *Good v. Fichthorn*, 144 Pa. St. 287, 27 Am. St. Rep. 630. Our brother Mitchell, delivering the opinion, said: "So here the testator gave an absolute fee, with express powers to consume or convey. He did not devise the unconsumed residue himself, but desired his wife to do so. He put his request in strong words, ordinarily importing command, but so used as to indicate only an intent, not to reduce the estate previously given, but to control one ²⁷⁸ of its incidents. Where that is the intent, no words, however strong, amount to more than a request which cannot be enforced by law." There are many other cases to the same effect, but it is not necessary to cite them.

Judgment affirmed.

DEVISE—RESTRICTION ON.—If a testator gives his wife an absolute fee, with express power to consume or convey, without devising the unconsumed residue himself, but desiring her to do so in a certain manner, such request will not change, qualify, or reduce the estate previously given: *Good v. Fichthorn*, 144 Pa. St. 287, 27 Am. St. Rep. 630.

HEMINGWAY'S ESTATE.

[195 Pennsylvania State, 291.]

INSANITY.—DELUSION IS A BELIEF that something exists which does not exist, and which no rational person, in the absence of evidence, would believe to exist.

WILLS.—DELUSIONS on the part of a testatrix, though without foundation, that her sons had defrauded her are not sufficient ground to set aside her will passing over such sons. They still have the burden of proof to show not only that the testatrix was laboring under such delusions at the time she made the will, but also that the will was the result of such delusions, before a court is justified in setting aside the will therefor.

WILLS—DELUSIONS.—An unfounded delusion on the part of a testatrix that her sons had defrauded her is not sufficient ground to set aside her will excluding them, if it appears that the testatrix before her death sought a reconciliation with her sons, but that they neglected her, of which she complained to others.

H. J. Steele, for the appellant.

R. C. Stewart and W. S. Kirkpatrick, for the appellee.

²⁹² **SCHUYLER, P. J.** This is an appeal from the decision of the register admitting to probate a paper purporting to be the last will of the decedent. Her testamentary capacity is at-

tacked and there is a charge of undue influence, but the latter charge has not been much pressed, nor is it contended with very much earnestness that the testatrix lacked general testamentary capacity; but the serious complaint is that the will was the result of a delusion, and we are asked to award an issue to determine that question. The facts are within a narrow compass. The testatrix was a widow and left to survive her two sons and a daughter. By her will she passes over her two sons entirely and gives the bulk of her estate to the daughter. Prior to the death of her husband, which antedated the will nearly eight years, she and her sons were on the best of terms, but soon after that event trouble arose between them over the settlement of her husband's estate. She charged her sons with trying to rob her, and persisted in the belief that they had robbed her down to the time of her death. There was not the slightest foundation for these suspicions, and the appellant, one of the sons, now contends that they were the result of delusion such as to invalidate the will.

Is that so? We are constrained to answer the question in the negative and on the authority of *McGovran's Estate*, 185 Pa. St. 203, the very latest deliverance of the supreme court on the subject of insane delusions. In that case the testatrix was a single woman, her nearest kindred being cousins in the first degree. By her will, after a few minor bequests, she directed ²⁹³ the balance of her estate to be distributed under the intestate laws, excluding, however, one of the cousins. The feelings of the testatrix toward this cousin underwent a marked change shortly prior to the making of the will. Up to that time their relations had been kindly, but suddenly the testatrix became suspicious of her and was unwilling to have her in the house, fearing that she might take the testatrix's life. It was conceded at the hearing that the cousin was discriminated against in the will solely because of this change of feeling, and there was nothing in the evidence to explain or account for it, and yet it was held that these facts did not make out a case of delusion in the legal acceptation of that term, and this on the theory that to constitute delusion the belief must be that something exists which does not exist and which no rational person, in the absence of evidence, would have believed to exist. The reasoning of Judge Stewart, before whom the case was heard in the court below, and whose opinion was adopted by the supreme court in support of this conclusion, is so irresistible, and it fits so exactly the case at bar, that we may well be ex-

cused from any further discussion of the question. It may not be easy, yet we think it possible, to reconcile McGovran's Estate, 185 Pa. St. 203, with Thomas v. Carter, 170 Pa. St. 272, 50 Am. St. Rep. 770, but whether possible or not it contains the last word of our supreme court on the subject of insane delusions, and by that we must be governed.

But even if it be conceded that the testatrix was laboring under a delusion, that alone would not entitle the appellant to an issue. The burden would still rest upon him to show that the will in question was the result of the delusion. Does the evidence show that to have been the case? When the suspicions of the testatrix were first aroused against her sons, they were followed by a paroxysm of anger, during which she threw a heavy iron wrench at one of them and attempted further violence upon him, and her anger continued unappeased for a considerable time. As the years rolled by, however, she began to show signs of relenting. She lived entirely alone, without even a servant. She often expressed a wish that her sons would visit her and spoke to some of her friends to intercede with them in that behalf. On one occasion she met one of her sons, the one at whom she had thrown the wrench, and greeted him affectionately. During the six years preceding the date of the will that ²⁹⁴ son never visited her, and during the same period the other son visited her but once, and then on invitation.

We must not be too swift to censure these sons for their seeming neglect. If the testimony is to be believed, their mother was a very peculiar old lady, fault-finding, complaining, whimsical, suspicious, and with a temper of her own. While her suspicions against her sons seem to have been smothered, they were not entirely quenched. She had sufficient means of her own to supply every reasonable want, while her daughter, between whom and the sons there was bitter hostility, and who was a regular visitor at her house, stood ready and willing to render her service in time of need. It is an open question whether the sons declining to visit the mother under these circumstances was not an act of commendable prudence. But this is only by the way. The question is, What effect, if any, did this seeming neglect have on the testatrix? According to the daughter, and she is uncontradicted, the testatrix complained of it bitterly. Was this why she disinherited her sons? Who can tell? Certain it is that in no just view of the testimony could a jury find that it was not. It would be a vain proceeding, therefore, to award an issue to try the question. On both

of the grounds above mentioned we are clearly of the opinion that the appellant is not entitled to an issue to try the question of delusion, as we are equally clear that the same is true of the charge of general testamentary incapacity and the charge of undue influence.

The prayer for an issue is denied and the appeal is dismissed at the cost of the appellant. To which decree contestant excepts and bill sealed.

295 PER CURIAM. We think the opinion of the learned court below sufficiently vindicates the conclusion reached that the issue asked for in this case ought to be refused. The case of McGovran's Estate, 185 Pa. St. 203, cited by the learned judge, clearly rules the present application. This case was followed in refusing the application, and we therefore affirm the decree for the reasons stated in the opinion of the court below.

INSANITY.—A DELUSION is a belief in a state or condition of things which no rational person would believe: See the monographic note to *People v. Hubert*, 63 Am. St. Rep. 81. A delusion sufficient to avoid a will is a creature purely of the imagination such as no sane man could believe—a belief in the existence of something that does not exist: *Taylor v. Trich*, 165 Pa. St. 586, 44 Am. St. Rep. 679.

INSANE DELUSIONS CREATING AVERSIONS AGAINST HEIRS, or bias in favor of legatees and devisees, are considered in the monographic note to *People v. Hubert*, 63 Am. St. Rep. 96-99.

INSANE DELUSIONS.—PRESUMPTIONS and burden of proof respecting insane delusions affecting testamentary capacity are considered in the monographic note to *People v. Hubert*, 63 Am. St. Rep. 106-108.

SNAYBERGER v. FAHL.

[195 Pennsylvania State, 336.]

FRAUDULENT CONVEYANCES—PREFERENCES.—If a creditor takes a judgment, or conveyance, or payment in any form, to secure an actual debt, the transaction is valid against other creditors, although the former knew that the effect would be to postpone the others, and the debtor intended it to have that effect. The criterion is not the effect but the fraudulent intent.

FRAUDULENT CONVEYANCES—PREFERENCES.—To impeach the securing or payment of an actual debt there must be evidence tending to show, first, some other advantage or benefit to the debtor beyond the discharge of his obligation, or, secondly, some other benefit to the creditor beyond mere payment of his debt, or lastly, some injury to other creditors beyond mere postponement of the debt preferred.

FRAUD—PROOF OF.—If fraud is alleged, great latitude of proof is allowed, and every fact or circumstance from which a legal inference of fraud may be drawn is admissible. Yet fraud cannot be presumed, but must be proved, clearly and distinctly, by the party alleging it.

FRAUDULENT CONVEYANCES—PREFERENCES.—THE MOTIVE OF THE CREDITOR preferred and not of the debtor determines the fraudulent character of a conveyance or transaction attacked on the ground that it was made with intent to defraud other creditors.

FRAUDULENT CONVEYANCES—PREFERENCES—MORTGAGE.—If a mortgage defectively executed is given for a valid debt, the mortgagor may, just before a verdict is taken against him by another creditor, absolutely convey the mortgaged premises to the mortgagee, and if the amount of the mortgage is just about the same as the value of the property, and the only intent of the parties is to secure payment of the mortgage, the conveyance is not fraudulent as to other creditors.

R. H. Koch, for the appellants.

N. Heblich and W. F. Shepherd, for the appellee.

338 MESTREZAT, J. This action of ejectment was brought April 12, 1892, was tried in January, 1899, and resulted in a verdict for the plaintiff.

Henry Fahl, by deed dated March 31, 1874, conveyed to Sybilla Fahl, wife of his son, Joseph Fahl, sixty-three acres of land in West Brunswick township, Schuylkill county, being the premises in dispute. This deed was not recorded until January 30, 1891. David Faust entered a judgment against Henry Fahl on March 17, 1874, for fourteen hundred and thirteen dollars and seventy-eight cents, which judgment was amicably revived on March 1, 1879, for sixteen hundred and forty-eight dollars and ninety-three cents, without notice to Sybilla Fahl. Faust entered another judgment against Henry Fahl on April 1, 1875, for two hundred and fifty dollars. Fieri facias were issued on these judgments to September term, 1879, and on these writs the premises in dispute and another tract of land containing eighty-eight acres were levied on and condemned. Writs of venditioni exponas to November term, 1879, were issued on both judgments and the properties levied on were sold by the sheriff. Isaac Hoffmeister purchased the sixty-three acre tract for twelve hundred and fifty dollars, which sum was applied by the sheriff to the payment of Henry Fahl's debts. A deed for the premises, dated December 29, 1879, and duly acknowledged by the sheriff the same day in open court, was delivered to Hoffmeister. After this sale Sybilla Fahl and her husband continued to reside on the premises, paid rent to Hoff-

meister, and recognized the title as having been vested in him by the sheriff's sale.

By deed dated January 3, 1882, acknowledged January 11, 1882, and recorded January 16, 1882, Hoffmeister and wife conveyed ^{and} the premises to Sybilla Fahl for the consideration of sixteen hundred and forty dollars, which was secured by a mortgage on the premises dated January 13, 1882, and recorded February 2, 1882. The consideration named in the deed was made up of four hundred and thirty-one dollars and twenty-six cents, due Hoffmeister on a book account against Joseph Fahl, and of the twelve hundred and fifty dollars paid by Hoffmeister to the sheriff, less forty-one dollars and twenty-six cents paid in cash to Hoffmeister. Subsequent to the execution and delivery of the mortgage it was discovered that Sybilla Fahl's acknowledgment thereto was defective.

Henry Fahl died intestate on April 24, 1883. In 1884 F. S. Snayberger, his administrator, brought an action against Sybilla and Joseph Fahl, to recover the purchase money due from her for the land in dispute, conveyed by Henry Fahl, in 1874. The case was tried in January, 1891, and at 10:13 A. M. of January 30th, the jury rendered a verdict for the plaintiff for three thousand three hundred and fifty dollars. About a quarter of an hour previous to the verdict Isaac Hoffmeister recorded a deed for the land, executed, acknowledged, and delivered to him on that day by Sybilla Fahl and Joseph Fahl. The consideration of the deed was one dollar, and the cancellation of the defectively acknowledged mortgage of January 13, 1882.

Sybilla Fahl and her husband and Isaac Hoffmeister were neighbors, members of the same church, and had been friends for many years. Immediately after the sheriff's sale in 1879 and at all times thereafter Sybilla Fahl and her husband conceded that the title to the premises had passed by that sale to Hoffmeister. They thought that, as the money he had paid the sheriff had been applied to the payment of Henry Fahl's indebtedness, he should have and had a legal claim to the property. The action brought by Henry Fahl's administrator caused them some anxiety for the security of the money paid by Hoffmeister to the sheriff and for which they had given him their mortgage. During the trial of that cause, on the evening prior to the rendering of the verdict, Sybilla Fahl consulted counsel in regard to the matter, and was advised that owing to the defective acknowledgment of the mortgage its validity

might be successfully challenged, but that she and her husband could secure Hoffmeister by the execution and delivery of a deed to him for the premises. This plan was adopted. Pursuant to the instructions of Judge Koch, counsel of the parties, they came to ³⁴⁰ Pottsville on the morning of January 30, 1891, and met at his office. He explained the matter fully to them. The deed was then prepared and executed there, and it was agreed by the parties that the mortgage should be considered canceled. At the suggestion of Judge Koch the deed was taken immediately to the recorder's office and placed on record before the opening of the court and rendition of the verdict in the Fahl case.

The above is a statement of the material facts, and they are not controverted by any evidence in the case.

The view that we take of the case renders it unnecessary to consider the assignments of error seriatim. Many, if not all, of them should be sustained. The main point, however, involved in the case, the solution of which will dispose of the issue, is, whether there was sufficient evidence to warrant the jury in finding that the deed to Hoffmeister of January 30, 1891, was executed and delivered for the purpose or with the intent of defrauding the creditors of the grantors, Sybilla Fahl and her husband.

The right of a debtor to prefer one creditor over another has long been settled in this commonwealth. This may be done by a conveyance of property, by judgment, or in any other way except by an assignment in trust. In *Covanhovan v. Hart*, 21 Pa. St. 495, 60 Am. Dec. 57, it is held that a conveyance of land by a debtor in failing circumstances to a creditor to pay an existing debt is not fraudulent, although the parties contemplate that thereby the claims of other creditors will be defeated. In that case Chief Justice Black says (page 501): "The judge said in his charge that little room is left to attribute fraudulent motives, when a debt is actually due from the vendor nearly equal to the value of the property. He should have said there is no room at all." In the late case of *Werner v. Zierfuss*, 162 Pa. St. 360, Mr. Justice Mitchell reviews very fully the subject of conveyances in fraud of creditors, and states clearly the principles applicable to such cases. It is there held as a result of our cases that if a creditor takes a judgment or conveyance or payment in any form to secure an actual debt, the transaction will be valid against other creditors, although he knew that the effect would be to postpone the others; that the debtor intended it to have

that effect, and although he took it to aid that effect as well as to protect himself. The criterion is not the effect, but the fraudulent intent. ²⁴¹ In this case Justice Mitchell says (page 366): "Where there is payment of an actual debt there can be no question of fraud in fact for the jury without additional evidence of something which may be considered, either in itself or in its connection with the circumstances, a badge of fraud." And then he states it to be a general rule "that to impeach the payment or securing of an actual debt there should be evidence tending to show either, first, some other advantage or benefit to the debtor beyond the discharge of his obligation; or, secondly, some other benefit to the creditor beyond mere payment of his debt; or, lastly, some injury to the other creditors beyond mere postponement of the debt preferred."

Applying these principles to the case in hand, we are unable to see under the evidence that there can be any question as to the bona fides of the transfer of the premises by Sybilla Fahl and her husband to Hoffmeister by the deed of January 30, 1891. We have stated above the facts clearly deducible from the testimony, and they are not controverted by any evidence or inference that can be drawn from the evidence. From the time Hoffmeister purchased the property in 1879, Sybilla Fahl and her husband intended that he should have it or should be repaid the twelve hundred and fifty dollars which he paid the sheriff and which was applied to the debts of Henry Fahl. This was certainly equitable and just. They became Hoffmeister's tenants and remained such until 1882 when he conveyed the premises to Sybilla Fahl, and she and her husband executed and delivered him the mortgage. They regarded the mortgage indebtedness as bona fide, and have never denied or repudiated it. As a defense to the purchase money part of the mortgage, in the absence of fraud, the mortgagors could not set up a want of title: *Hersey v. Turbett*, 27 Pa. St. 418. Nor did the defective acknowledgment of the mortgage destroy the indebtedness which it represented. Mrs. Fahl never desired to take advantage of this irregularity or deny the validity of the debt due Hoffmeister, and we are unable to see why she should be compelled to do so. She created this indebtedness and gave the obligation to secure it more than a year and a half before the death of Henry Fahl, and more than nine years prior to the time when she paid it by the conveyance of the property to Hoffmeister in 1891.

342 It is claimed by the plaintiff that the testimony of Sybilla Fahl and her husband shows that the purpose of the deed to Hoffmeister in 1891 was to prevent the collection of the judgment recovered by him as administrator of Henry Fahl, deceased. Some of the answers of these witnesses to questions on cross-examination apparently sustain this contention. But they were both examined through an interpreter, and the replies thus imputed to them are clearly shown by their testimony as a whole to have been given under a misapprehension of the questions. Their entire testimony so conclusively shows that the sole object in the execution and delivery of the deed was to secure their indebtedness to Hoffmeister, that on it alone the court could not sustain a verdict, finding that they had a different or contrary intention.

The evidence as to the value of the property in 1891 did not show that it was much, if any, greater than the mortgage debt. The difference, if any, between the value of the property and the debt was, therefore, not so great as to justify its submission to the jury as evidence of fraud. There was certainly no evidence that Mrs. Fahl or her husband did or was to receive for the conveyance of the land anything more than the payment of their indebtedness to Hoffmeister and the cancellation of the mortgage. Nor was there any testimony that Hoffmeister obtained anything beyond the title to the land in consideration of the satisfaction of the mortgage debt, or that the other creditors of Sybilla Fahl and her husband would be injured beyond the postponement of their debts. There was no evidence on either point to go to the jury.

Where fraud is alleged great latitude of proof is allowed, and every fact or circumstance from which a legal inference of fraud may be drawn is admissible: *Yerks v. Wilson*, 81* Pa. St. 9. Yet while this is true, fraud cannot be presumed but must be clearly and distinctly proved by the party alleging it. And "since the scintilla doctrine has been exploded both in England and in this country, there is a preliminary question in all cases for the court, not whether there is literally no evidence, but whether there is any that ought reasonably to satisfy the jury that the fact sought to be found is established; if there is evidence from which the jury can properly find the question for the party on whom the burden of proof rests, it should be **343** submitted; if not, it should be withdrawn from the jury": Per Clark, J., in *Cover v. Manaway*, 115 Pa. St. 346, 2 Am. St. Rep. 552.

The learned judge of the court below tried the case on the theory that if Mrs. Fahl and her husband conveyed the premises to Hoffmeister with intent to defraud their creditors, the deed would be void regardless of Hoffmeister's intentions. This was clearly erroneous under all the authorities. The motive of the creditor, and not the intent of the debtor, determines the fraudulent character of the transaction.

Regarding, then, the mortgage debt as an existing indebtedness, there was no evidence to submit to the jury that the conveyance to Hoffmeister was with a fraudulent intent on his part or on that of the grantors. He was trying to secure the payment of an honest debt and they were assisting him in that object. That it was done at the time and under the circumstances shown by the testimony does not militate against the honesty or purpose of the act. It is not denied that reputable counsel, with a full knowledge of all the facts, advised the parties that the conveyance to Hoffmeister would be legitimate, and that it was made under his supervision. While the effect of the transaction might be to postpone and, possibly, to prevent the collection of the judgment of Henry Fahl's administrator, yet the evidence fails to disclose any fraudulent intent on the part of the grantors or grantee, and the question should not have been submitted to the jury.

Entertaining the views above expressed, we think the learned judge should have affirmed the defendants' sixth point and instructed the jury that under all the evidence in the case the verdict should be for Isaac Hoffmeister, one of the defendants.

The tenth assignment of error is sustained and the judgment is reversed.

FRAUDULENT CONVEYANCE.—THE INTENT with which a deed is made, not the act of voluntarily conveying, renders it void: *Hudnal v. Wilder*, 4 McCord, 294, 17 Am. Dec. 744. Actual fraudulent intent must be established in order to render void, as to creditors, a conveyance made upon a valuable consideration: *Blake v. Jones*, 1 Bail. Eq. 141, 21 Am. Dec. 530. Moreover, there must be mutual participation in the fraudulent intent by the vendor and purchaser: See the monographic note to *State v. Mason*, 34 Am. St. Rep. 395. However, where the legal effect of a conveyance is to work a fraud on the rights of creditors, it will be deemed fraudulent as an inference of law, without regard to the motives prompting it: *Kingman v. Mowry*, 182 Ill. 256, 74 Am. St. Rep. 169. See, too, *Hart v. Church*, 126 Cal. 471, 77 Am. St. Rep. 195.

FRAUDULENT CONVEYANCE—PREFERENCES.—It is no objection to the validity of a conveyance by a debtor to his creditor that it operates to hinder and delay other creditors and is made with the intent on the part of the debtor that it shall so operate, provided the creditor receives it with the honest purpose of securing

his debt: See the monographic note to *State v. Mason*, 34 Am. St. Rep. 396, 397.

FRAUD.—WHAT EVIDENCE IS SUFFICIENT TO ESTABLISH fraud is considered in the monographic notes to *Burch v. Smith*, 65 Am. Dec. 157-164; *Brown v. Mitchell*, 11 Am. St. Rep. 757-759; *State v. Mason*, 34 Am. St. Rep. 402.

CORBIN v. PHILADELPHIA.

[195 Pennsylvania State, 461.]

NEGLIGENCE—WHEN QUESTION FOR JURY.—Circumstances may beget duties, which, under ordinary circumstances, cannot be implied, and if such circumstances are shown to exist, the question of negligence arising therefrom is not for the court, but for the jury.

NEGLIGENCE—TRENCHES FILLED WITH SEWER GAS. It is the duty of a city, upon discovering dangerous gas in sewer trenches dug by it, and the harmful effect of such gas upon its workmen, to give notice and warning of its presence to the public, and to promptly take steps to prevent anyone from descending into such trenches, especially when such descent may be made innocently, naturally, and lawfully from a variety of causes. A neglect of such duty on the part of the city is negligence.

NEGLIGENCE—ATTEMPT TO SAVE LIFE.—A rescuer who, from the most unselfish motives, prompted by the noblest impulses that can impel man to deeds of heroism, faces deadly peril, ought not to hear from the law words of condemnation of his bravery, because he rushes into danger to snatch from it the life of a fellow creature, imperiled by the negligence of another, but he should rather listen to words of approval, unless regretfully withheld on account of the unmistakable evidence of his rashness and imprudence.

NEGLIGENCE—ATTEMPT TO SAVE LIFE.—The law has so high a regard for human life that it will not impute negligence to an effort to save it, unless made under circumstances such as to constitute rashness in the judgment of prudent persons.

NEGLIGENCE—ATTEMPT TO SAVE LIFE.—For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence, which will preclude a recovery for an injury so received; but when the exposure is for the purpose of saving human life, it is not wrongful, and therefore not negligent, unless such as to be regarded either as rash or reckless.

NEGLIGENCE—ATTEMPT TO SAVE LIFE.—The law does not impute negligence to an attempt to preserve human life if such effort is made with a reasonable regard for the rescuer's own safety, and, where negligence on the part of the defendant is shown, the negligence of the person in danger cannot be imputed to the rescuer.

NEGLIGENCE—ATTEMPT TO SAVE LIFE—QUESTION FOR JURY.—It is not negligence per se for a person to voluntarily risk his own life or safety in attempting to rescue another from impending danger. The question whether one so acting should be charged with contributory negligence, in an action brought by him

to recover for personal injury received in attempting the rescue, is one of mixed law and fact, and should be submitted to the jury, upon the evidence, under proper instructions.

NEGLIGENCE.—ONE WHO IMPERILS HIS OWN LIFE for the purpose of rescuing another from impending danger is not chargeable, as matter of law, with contributory negligence, and if the life of the rescued person is endangered by the negligence of the defendant, the rescuer may recover for the injury received from the defendant in consequence of his intervention.

R. M. Schiek, for the appellant.

E. S. Miller, assistant city solicitor, for the appellee.

⁴⁶³ **BROWN, J.** The son of plaintiff lost his life in going to the rescue of an imperiled fellow being. He bravely descended into danger and found awaiting him the death from which he would have saved another. The endangered boy came back from his peril and lived, and we must now determine whether the mother of the deceased can be pecuniarily compensated for the loss she has sustained, or must be content with the consolation that her son died a heroic death. She makes claim against the city of Philadelphia, alleging that its negligence was responsible for the damages she has suffered, and unless sufficient proof to sustain her allegation was submitted to the jury, she cannot recover. The primary question involved is the alleged negligence of the city; for if it was "guiltless of all wrong," it is not liable to her; and no matter how heroically her son may have given up his own life in going down into danger to save another, her appeal to the law to compel the appellee to compensate her is in vain. The learned trial judge, after the testimony on each side had been submitted to the jury, directed a verdict for the defendant, giving no reasons for so taking the case from their consideration. His judgment may have been that there was no sufficient evidence to establish the negligence of the defendant, or he may have thought that even if the city was negligent, the rescuer's conduct was such as to prevent a recovery. To properly dispose of this appeal we must pass ⁴⁶⁴ upon both these questions, and first take up what we have said is the primary one, reviewing the evidence, in the light of which must be found the right of the plaintiff or the immunity of the defendant.

In the summer of 1896 the city of Philadelphia had dug several trenches on the north side of Clearfield street, west of Fifth street, in an attempt to locate an old sewer that had been constructed many feet below the surface of the street. After

having excavated to the depth of twenty-eight feet, according to the testimony of John Abel, called as a witness by the city, the effort to find the sewer was abandoned, because the gas had become so strong at that depth that workmen could no longer remain at the bottom of the trenches. The clear preponderance of the testimony is that for several days before Corbin went down to his death in one of these trenches work had been abandoned by the city for the reason stated, and it seems to be equally clear that the ordinary safeguards to protect the passing public from falling into these holes had not been provided, though the absence of such protection is not material in determining the questions that confront us. The plaintiff makes no claim that she lost the supporting arm of her son because he had fallen into a hole or ditch negligently left unguarded by the city, with no notice to the passerby that a pitfall was before him; but her complaint is that, though these trenches were open and notorious, avoidable by all who traveled the street, no sign had been made, no warning given of the death which the city knew lurked below, and to which at any time the unsuspecting might descend. These trenches had been dug in a street in a populous portion of the city. A church, attended by six hundred or seven hundred children, was within one hundred feet of them, and a public schoolhouse within a square. At the time Corbin met his death it was vacation and the school building was closed, but the lot on the north side of Clearfield street, immediately north of these trenches, extending a whole square, from Fifth street to Sixth street, was open, having no buildings on it, and was used as a playground. Boys were constantly playing ball upon it, and on Saturdays, after the factories had closed, hundreds of tired men and boys went to it for the recreation found in their innocent games. Under these admitted conditions the trenches were dug and work finally suspended upon ⁴⁰⁵ them on account of the deadly gas that had accumulated at the bottom. This the city knew, and apparently for days, but it gave no notice to the passerby of the danger in these holes, and the hundreds who congregated on the adjoining playground had no warning that it might mean to go down to death to go after a ball which, in their sports, might be accidentally batted or thrown into the trenches. On the afternoon of August 5, 1896, boys were playing ball on this vacant lot and their ball rolled down into one of these trenches. Corbin, the deceased, who with a companion was near, said, "Let us get the ball for

the poor boys," and walked over to the trench. Before reaching it, however, a boy named Walker had gone down to get the ball, there having been cross-pieces of wood in the trench from side to side, making practically a ladder to the bottom. The boy Walker, after reaching the bottom, got the ball and started to ascend; but when he had reached the first cross-piece fell back, with his face to the ground. Corbin then went down to his rescue, but was overcome by the gas and died. Walker revived, came to the top unassisted, and walked away.

It is insisted that the city of Philadelphia was not bound to anticipate the descent of anyone into this danger, and, therefore, not negligent in failing to adopt proper means for the exclusion of all persons from these holes. We cannot sustain this view. If the city was negligent, it was liable for the consequences of its neglect, though those consequences were not, and could not, by any ordinary prudence have been anticipated: *Oil City Gas Co. v. Robinson*, 99 Pa. St. 1. These trenches were across a public street, along which men and women daily passed, and with no notice or warning of the deadly danger below, and, with the easy means of descent, can it be seriously questioned that the city ought not to have anticipated that what did happen might happen? Ought it not reasonably to have been anticipated that if the hat of a passerby should be carried by the wind from his head to the bottom of one of these holes he would most naturally go or send some one down to recover it? The veil or handkerchief of a passing woman might be blown into the trench, and he who would not anticipate her clamor that someone go down and get it for her, and that chivalrous response would be instantly made, knows little of human nature. Under the circumstances the city ought to have anticipated ⁴⁶⁶ descents into these holes; but we need not conjecture what its anticipations ought to have been, for before Walker went down to get the ball others had been down. Stroman testifies that he went down to get a ball on the Tuesday before Corbin's death, and Roth states that he had seen a boy go down for a ball "to the last round and get the ball." Stroman says he did not stay long on account of the gas; that a funny feeling came over him and he had a "hard time" getting up. Emil Hagan says he saw a boy go down before August 5th. Why should Stroman and these boys not have gone down for the ball? The amusement and recreation of playing ball were lawful, and the probabilities that the ball might be knocked or thrown into the trench were great; but the city had

given no warning of the danger and, perhaps, death which, according to the testimony submitted, it must have known were at the bottom of the hole.

If it is true, as has often been said, that circumstances beget duties, the duty of the city, after discovering the dangerous gas in the trenches and its effect upon the workmen, was clearly to give notice and warning of it to the public, and to promptly take steps to prevent a descent into it, not unlikely to occur at any time from causes already suggested and others that might be mentioned.

In *Hydraulic Works Co. v. Orr*, 83 Pa. St. 332, there was a platform in a private alley communicating with a public street. This platform was raised and lowered for the convenience of the company in receiving and shipping goods, and when not in use was kept in place by inclining against the wall, without any fastening. At the entrance to the alley were gates, which were opened and shut as necessity required and upon them was posted, "Private—No Admittance"; and yet a child having strayed into this private alley and having been caught under the platform, which tilted over on it, in an action brought by the parents to recover damages for its death, it was held that the negligence of the company was properly submitted to the jury. It was there said by Chief Justice Agnew: "But it has been often said duties arise out of circumstances. Hence, where the owner has reason to apprehend danger, owing to the peculiar situation of his property and its openness to accident, the rule will vary. The question then becomes one for a jury, to be determined upon all its facts of the probability of danger¹⁰⁷ and the grossness of the act of imputed negligence. Such was the nature of this case. This building was a factory in which several kinds of business were carried on in different stories, requiring the use of a hoisting apparatus above and an inclined plane below for the easy carriage of heavy articles, machinery, etc., into and out of the factory. These appliances were approached by means of a private opening or cartway shut in by a gate, which their use required to be often opened for the ingress of wagons and hands engaged in the business. The gate and passageway opened out upon a public and much frequented street, where persons were passing and children playing. Unlike an ordinary private alley, this passage was often open, and therefore liable to the incursions of children and even grown persons, from thoughtlessness, accident, or curiosity. Now, the inclined way, which did the injury, was a dan-

the injury that caused his death. The evidence showed that the train was approaching in plain view of the deceased, and had he, for his own purposes, attempted to cross the track, or, with a view to save property, placed himself voluntarily in a position where he might have received an injury from a collision with the train, his conduct would have been grossly negligent and no recovery could have been had for such injury. But the evidence further showed that there was a small child upon the track who, if not rescued, must have been inevitably crushed by the rapidly approaching train. This the deceased saw, and he owed a duty of important obligation to this child to rescue it from its extreme peril, if he could do so without incurring great danger to himself. Negligence implies some act of commission or omission wrongful in itself. Under the circumstances in which the deceased was placed, it was not wrongful in him to make every effort in his power to rescue the child compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself. If from the appearances he believed that he could, it was not ⁴⁷⁰ negligence to make an attempt so to do, although believing that possibly he might fail and receive an injury himself. He had no time for deliberation. He must act instantly, if at all, as a moment's delay would have been fatal to the child. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs or in the mere protection of property knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury is negligence, which will preclude a recovery for an injury so received; but when the exposure is for the purpose of saving life, it is not wrongful, and, therefore, not negligent, unless such as to be regarded either rash or reckless. The jury were warranted in finding the deceased free from negligence under the rule as above stated. The motion for a nonsuit was, therefore, properly denied. That the jury were warranted in finding the defendant guilty of negligence in running the train in the manner it was running requires no discussion." Approving this case, the same court, in *Spooner v. Delaware etc. R. R. Co.*, 115 N. Y. 22, held that if the plaintiff stepped upon the track of the railroad company in the humane effort to save younger children from danger, she was not a tres-

passer, and the verdict in her favor for the injury she suffered in trying to save the little children was sustained.

In *Gibney v. State*, 137 N. Y. 1, 33 Am. St. Rep. 690, plaintiff, with her husband and infant son, was crossing a bridge over the Erie canal; the son fell into the canal through an opening in the railing of the bridge, which had been left unguarded; the father plunged into the canal to rescue him, and both were drowned. Plaintiff recovered for the damages she had sustained, and in affirming the judgment of the lower court it was held that, while the immediate cause of the peril to which the father naturally and instinctively exposed himself was the peril of the child, the cause of the peril in both cases might be attributed to the culpable negligence of the state in leaving the bridge in a dangerous condition. In this case, *Eckert v. Long Island R. R. Co.*, 43 N. Y. 503, 3 Am. Rep. 721, was again approved.

It was held in *Peyton v. Texas etc. Ry. Co.*, 41 471 La. Ann. 861, 17 Am. St. Rep. 430, that the law has so great a regard for human life that it will not impute negligence to an effort to preserve it, if the effort is made with a reasonable regard for the rescuer's own safety, and where negligence on the part of the defendant is shown, the negligence of the person in danger cannot be imputed to the rescuer. In the case before us, under the clearly established facts, no negligence can be imputed to Walker.

The question of the contributory negligence of a rescuer is considered in *Linnehan v. Sampson*, 126 Mass. 506, 30 Am. Rep. 692, where it was contended on behalf of the defendant that the calls of humanity did not excuse him. It was held, however, that the question whether the plaintiff's conduct on the occasion of the injury was wanting in reasonable prudence and caution, in view of all the circumstances, was properly submitted to the jury as a question peculiarly for them to decide. "They were to consider all the circumstances, and, among other things, that the life of a fellow creature was in extreme danger; but they must have understood that reasonable prudence and caution were elements in the case which plaintiff must prove. . . . The emergency was sudden, allowing but little time for deliberation. Some allowance might well be made for the confusion of the moment. . . . The law does not require cowardice or absolute inaction in such a state of things. Neither does it require in such an emergency that the plaintiff should have acted with entire self-possession, or that he should have

taken the wisest and most prudent course, with a view to his own self-preservation, that could have been taken. He certainly may take some risk upon himself, short of mere rashness and recklessness."

In *Donahoe v. Wabash etc. Ry. Co.*, 83 Mo. 560, 53 Am. Rep. 594, it was ruled that the negligence of the company as to the person in danger was to be imputed to the company with respect to him who attempted the rescue.

It is not negligence per se for one to voluntarily risk his own safety or life in attempting to rescue another from impending danger. The question whether one so acting should be charged with contributory negligence in an action brought by him to recover damages for injuries received in attempting the rescue is one of mixed law and fact, and should be submitted to the jury upon the evidence, with proper instructions from the court. While one who rashly and unnecessarily exposes himself ⁴⁷² to danger cannot recover damages for injuries thus brought on himself, yet where another is in great and imminent danger, he who attempts a rescue may be warranted by surrounding circumstances in exposing his limbs or life to a very high degree of danger. In such case he should not be charged with the consequences of errors of judgment resulting from the excitement and confusion of the moment; and if he did not act rashly and unnecessarily expose himself to danger, and is injured, the injury should be attributed to the party that negligently or wrongfully exposed to danger the person who required assistance: *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316, 29 Am. St. Rep. 553.

The late and well-considered case of the *Maryland Steel Co. v. Marney*, 88 Md. 482, 71 Am. St. Rep. 441, sustains the views expressed in the foregoing authorities, and by their "aid" it was again ruled that one who voluntarily incurs peril caused by the negligence of another, in order to save the life of one imperiled by the same negligence, is not debarred from recovery upon the ground of his own contributory negligence.

Recognizing the manifest correctness of the views expressed in the foregoing and other cases, the best text-writers have properly adopted them as the law for guidance of courts and juries. When one risks his life, or places himself in a position of great danger, in an effort to save the life of another, or to protect another who is exposed to a sudden peril or in danger of great bodily harm, such exposure and risk for such a purpose are not negligent. The law has so high a regard for human life that it will not impute negligence to an effort to

preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons: Beach on Contributory Negligence, sec. 15. One who imperils his own life for the sake of rescuing another from imminent danger is not chargeable, as a matter of law, with contributory negligence, and if the life of the rescued person was endangered by the defendant's negligence, the rescuer may recover for the injuries which he suffered from the defendant in consequence of his intervention: Shearman and Redfield on Negligence, sec. 85.

In view of what we have said, and in the light of the authorities approvingly cited, this case was improperly disposed of by the court below, and must be sent back for another trial, that a jury may pass upon the question of the city's negligence and ⁴⁷³ determine whether Corbin, under the circumstances, acted with a due regard for his own safety, or so rashly and imprudently that his surviving mother cannot recover for the loss she has suffered. In passing upon this latter question it will be remembered, on the one hand, that, looking down and seeing the prostrate and motionless form of Walker, he may have been sufficiently warned not to descend into the danger, and his conduct may have been so rash and imprudent that, in the judgment of a jury, there ought not to be a recovery; on the other, it will not be forgotten that he had no time for deliberation, and was bound to act, if at all, instantly, as a moment's delay might have made his going down too late; and it will be still further remembered that, shortly before the day of his death, others had gone down into the trenches and returned unharmed; that the very boy whom he would have saved came back unaided from the bottom of the hole, and that those who went down for him came up uninjured. What the verdict of the jury should be it is not for us to say, and we do not pretend to intimate. Our duty is simply to direct that, intelligently instructed, they pass upon the questions involved. Theirs will be to render a just finding.

It is finally contended on behalf of the city that it is not liable, because the alleged negligence was that of an independent contractor. As to this defense it need only be said that, under the evidence offered by the city itself, it is without merit. For the reasons given the judgment is reversed and a *venire facias de novo* awarded.

MITCHELL, J., dissenting. I cannot see that the city was guilty of any negligence that contributed to the accident. It

had obstructions around the ditch sufficient to indicate that the place was dangerous. If one had fallen in at night, the obstructions might be held insufficient, and it may even be admitted, so far as this case is concerned, that if one going down in daytime with only the apparent risk of the descent before him had ignorantly encountered the gas, he might have had an action for negligence in failing to warn him of the concealed danger. But any such negligence is wholly irrelevant to this case. Corbin saw the danger from the condition of the boy Walker, went into it knowingly, and ⁴⁷⁴ would not have been deterred by a warning placard, however specific.

There is, therefore, in my view only one question in the case, and that is whether the circumstances exonerated Corbin from the ordinary legal consequences of his act. I cannot see how the goodness or humanity of his motives can either exempt him or transfer the risk he ran to the city. It is a clear case for the application of the principle, "*Volenti non fit injuria*."

If a known danger is encountered in the performance of a specific duty, as in the case of risks taken by a fireman or a policeman, a different question is presented, but there was nothing of this kind here, for Corbin was a pure volunteer.

I have read the opinions cited by my brother Brown with close attention to discover from them some recognized principle of law to sustain the results arrived at; but I find nothing beyond an emotional basis of admiration for heroism, very creditable to human nature, but having no proper place in the administration of justice.

I would therefore affirm this judgment both on the absence of any negligence by the city which contributed to the accident, and on the voluntary character of Corbin's assumption of a known risk.

Green, C. J., and Fell, J., join in this dissent.

NEGLIGENCE—RESCUING ANOTHER.—One who voluntarily incurs danger caused by the negligence of another, in order to save the life of one imperiled by the same negligence, is not debarred from recovery for injury thereby received, upon the ground of contributory negligence: *Maryland Steel Co. v. Marney*, 88 Md. 482, 71 Am. St. Rep. 441; *Pennsylvania Co. v. Lagendorf*, 48 Ohio St. 316, 29 Am. St. Rep. 553. The law has so high a regard for human life that it will not impute negligence to an effort to preserve life, unless made under circumstances which, in the judgment of prudent persons, constitute rashness: See the monographic note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 849.

SEWERS.—THE LIABILITY OF MUNICIPALITIES respecting sewers is considered in the monographic note to *Chalkley v. Richmond*, 29 Am. St. Rep. 737-744.

CASES
IN THE
SUPREME COURT
OF
RHODE ISLAND.

PAWTUCKET v. BRAY.

[20 Rhode Island, 17.]

MUNICIPAL CORPORATIONS—OPENING IN SIDEWALK—NUISANCE—NEGLIGENCE.—An opening in the sidewalk of a public street of a city, if properly constructed, is not a nuisance, but persons negligently using it are liable for injury resulting therefrom, and a person thus injured may recover of the persons guilty of such negligent use or the city, or both.

MUNICIPAL CORPORATIONS—JUDGMENT AGAINST, WHEN CONCLUSIVE ON PARTY LIABLE TO CITY.—If a person injured by reason of the negligence of a third person, in the use of an opening in a sidewalk in a public street, not in itself a nuisance, has sued and recovered therefor from the city, the latter has its action over against such person guilty of the negligence, and he, having been duly notified to defend the original suit, is bound by the judgment therein.

JUDGMENTS—RES JUDICATA—PARTIES.—A judgment recovered against a municipal corporation for injury caused by a defect or obstruction in the highway is conclusive evidence of its necessary facts and conditions, in a subsequent action by the municipality against a third person, the author of the defect or nuisance, who is liable over and who was notified of the first suit.

J. L. Jenks, city solicitor, for the plaintiff.

A. Green, for the defendant.

18 STINESS, J. The defendants are the proprietors of a store on Main street, in the city of Pawtucket, from the cellar of which they operate a freight elevator to the sidewalk in front of the store. The elevator well is covered by an iron grating, opening from the center in two parts on hinges at the sides, at right angles from the front of the building. On the 26th of November, 1889, while they were using the elevator,

Mrs. Julia Major, who was passing along the sidewalk about dusk, stepping sidewise, fell into the opening and was injured. She brought suit against the city of Pawtucket, and the defendants were notified to appear and defend it, as the city would look to them for any judgment which might be recovered. The case was tried, the defendants did not appear, and judgment was obtained against the city for the sum of three thousand four hundred dollars, which has been paid. This suit is for reimbursement by reason of the ultimate liability of the defendants.

The right to reimbursement is recognized in *Bennett v. Fifield*, 13 R. I. 139, 43 Am. Rep. 17, where the court says that if the town is forced to pay for the injury it will have an action over against the party who placed the obstruction in the highway. The case of *Hill v. Bain*, 15 R. I. 75, 2 Am. St. Rep. 873, is a practical recognition of the same thing, because one reason assigned for overruling the demurrer to the town's plea of former judgment against the plaintiff in favor of the alleged wrongdoer was that if the wrongdoer should be notified to come in to defend the suit and should do so, he would be entitled to the benefit of his former judgment. But the only ground upon which he could assume the defense of the suit against the town is the right of the town to call upon him for reimbursement: See, also, the recent case of *Washington Gas Light Co. v. District of Columbia*, 161 U. S. 816; *Dillon on Municipal Corporations*, 4th ed., sec. 1035, and cases cited.

We do not understand the defendants to deny that this ¹⁹ rule is established by the decided weight of authority, but they claim that under the decision of this court in *Adams v. Fletcher*, 17 R. I. 137, 33 Am. St. Rep. 859, the fact of an opening in the sidewalk is not of itself a nuisance, and that the court must find that the defendants were negligent in the use of it. We agree with the decision in that case that an opening in the sidewalk, if properly constructed, is not a nuisance; and in that case, as well as in this, so far as appears, such was the fact. But the case of *Adams v. Fletcher*, 17 R. I. 137, 33 Am. St. Rep. 859, was an action against the owner of a building, who had leased it to a tenant who was in occupation, and it was by the negligence of the tenant, or those who were serving him with coal, that the cover was left off at the time of the injury. There was no negligence on the defendant's part. But in this present suit the cause of the injury was the negligence of the servants of these defendants, and we see nothing in *Adams v. Fletcher*, 17 R. I. 137, 33 Am. St. Rep. 859, which excuses them.

The party injured could have sued originally either these defendants for their negligence or the city of Pawtucket, or both: *Bennett v. Fifield*, 13 R. I. 139, 43 Am. Rep. 17. Having sued the city, it has its action over against the party primarily responsible for the injury, by reason of negligence in the use of an opening, not in itself a nuisance. This being so, we think it follows from the cases cited above that the defendants, who were duly notified to defend the original suit, are bound by the judgment in that suit. In this case the plaintiff has also introduced evidence to show that the proximate and sole cause of the injury was the negligence of the defendants' servants. They had been notified that the opening was dangerous and that it should be protected. One of the defendants testified that it was customary to protect it by a board in front when the doors were open, the doors themselves being a sufficient protection for the sides, where they stood up nearly perpendicular. The precaution of putting up the board was omitted on the occasion of this accident. The only precaution taken was that the two men shouted "elevator" as they came up on it. At the time of day, about 5 o'clock in the afternoon in November, this can hardly be called a precaution, especially to a woman like Mrs. Major, who was ²⁰ deaf. This testimony is properly introduced to show that the negligence of the defendants was the proximate cause of the injury, and so that there is a right of recovery over in this case.

The defendants claim that under the case of *Central Baptist Church v. Manchester*, 17 R. I. 492, 33 Am. St. Rep. 893, the defendants are not bound by the judgment against the city. The cases are quite different. To an action in ejectment Manchester pleaded that he brought a suit and recovered judgment against a person who claimed to be the agent of the Central Baptist Church, and that the church was thereby estopped from prosecuting its action. The decision was that the plaintiff was not bound by the former judgment, because there was no such relation between the parties as to make the plaintiff privy to the judgment, and also because the plaintiff had not made itself privy in fact by assuming the defense of the former suit. This position was supported by citing Black on Judgments, section 540, and by remarks of the court. The court said: "To bind one not a party of record by a former judgment, it is essential that he should have openly intervened in the former suit, assuming its direction and control, to the knowledge of the opposite party, for the prosecution or defense of some in-

terest in the subject of the suit, or to avert a liability he may be under to indemnify the defendant against an adverse judgment." The defendants claim that this language exempts them from liability on the judgment. A comparison of the words of the court with the citation shows that it was intended to be a restatement of the section from Black on Judgments. That section relates to cases, as shown by those cited, where one party sought to hold the other party not related to the cause of action by a former judgment, because he had taken some part in the case. And so it is stated broadly that to have this effect such a party must have assumed control of one side of the case, openly and to the knowledge of the other side, upon the principle that estoppels must be mutual. But the case at bar, as we have shown, does not depend upon an estoppel from the defendants' intervention in the former suit, but upon their liability over ²¹ to the plaintiff by reason of their negligence, which was the proximate cause of the injury for which the recovery against the plaintiff was had. "It is a well-established rule, and one which has been recognized and enforced in a number of noteworthy cases, that a judgment recovered against a municipal corporation for injuries caused by a defect or obstruction in the highway is conclusive evidence of its necessary facts and conditions, in a subsequent action by the municipality against a third person, the author of the defect or nuisance, who is liable over and who was notified of the first suit": Black on Judgments, sec. 575.

Under this rule the defendants are liable in this action, and the plaintiff is entitled to judgment for the amount claimed.

DEFECTIVE STREETS AND SIDEWALKS—LIABILITY FOR. Both the city and the owner of a building are liable for injuries sustained by one who falls into an unguarded excavation extending onto the sidewalk, with descending steps to a cellarway in the front wall of the building: Note to Browning v. Springfield, 63 Am. Dec. 857. And if a street is left in an unsafe condition through the negligence of an individual, and a judgment is recovered against the town for injuries caused thereby, the town may maintain an action against him: Note to Lowell v. Boston etc. R. R. Co., 84 Am. Dec. 40; Lowell v. Spaulding, 4 Cush. 277, 50 Am. Dec. 775.

MARSHALL v. PERKINS.

[20 Rhode Island, 84.]

HUSBAND AND WIFE—NECESSARIES—LOAN TO WIFE.
A husband is not liable for money loaned to his wife with which to buy necessities.

C. H. Page and F. P. Owen, for the plaintiff.

D. S. Baker, for the defendant.

84 PER CURIAM. The court is of opinion that the defendant is entitled to a new trial upon exception to the refusal of the third request for instruction to the jury, viz.: "That he is in no case liable for money loaned to the wife, even though it be to purchase necessities."

In *Gill v. Read*, 5 R. I. 343, 73 Am. Dec. 73, Ames, C. J., said: "It is old law that neither a wife nor an infant has credit to borrow money, the credit being for necessities and not for money to buy them with, which may be misapplied. If, indeed, the lender lays out the money or sees it laid out for necessities, he may charge them as provided by himself, and thus the application of the loan is left, as it should be, at his peril. If, as we understand the bill of exceptions, the money was furnished by the plaintiff directly to the wife, and there was no evidence that the same was applied by her to the purchase of necessities, which the plaintiff charged, as he might, as furnished by himself, the ruling as to these items was erroneous."

The court is of the opinion that that case is not substantially different from the present. The credit which the law recognizes is for necessities, and not for money to buy them with, which may be misapplied. The present case does not show that the plaintiff either furnished the necessities or ⁸⁵ saw that the money advanced was laid out for necessities, and hence he is not within the rule. If the testimony of the wife alone that the money was laid out for necessities should be held to be sufficient, it would open the door to the liability for misapplication, which it is the purpose of the rule to prevent.

New trial granted, and case remitted to the common pleas division for further proceedings.

NECESSARIES.—A HUSBAND IS NOT LIABLE for money loaned to his wife, though she may have used it in procuring necessities: *Walker v. Simpson*, 7 Watts & S. 83, 42 Am. Dec. 216. See, too, *Skinner v. Tirrell*, 159 Mass. 474, 38 Am. St. Rep. 447; note to *Cunningham v. Irwin*, 10 Am. Dec. 464, 465.

PETITION OF WILLBOR.

[20 Rhode Island, 128.]

SURVIVORSHIP—CONSTRUCTION OF WILL.—If three sisters execute wills by which each devises all of her real and personal estate to her two sisters or the survivor, and after her death certain legacies to certain named legatees, and subsequently all three of the testatrices lose their lives in the same disaster, with no fact or circumstance appearing from which it can be inferred that either survived the others, the question of survivorship is unascertainable, and the rights of succession to their estates are to be determined as if death occurred to all at the same moment. In such case the wills must stand as if they contained only the bequests to the legatees named and then surviving, and the residue of the estate, real and personal, of each testatrix, if any, passes as intestate estate to her next of kin and heirs at law.

D. W. Fink and W. R. Perce, for the parties in interest.

126 MATTESON, C. J. This is a case stated for an opinion of the court as follows: Three sisters, Charlotte Willbor, Martha T. Willbor, and Eliza Ann Willbor, late of Newport, deceased, all perished in the same calamity—the burning of their house in Newport. They left instruments in writing purporting to be their last wills and testaments which have been duly admitted to probate. By these wills each testatrix gave and devised all her real and personal estate to her two sisters or to either of the survivors, and to their heirs and assigns forever, and then, having first directed that after the decease ¹²⁷ of the last sister the necessary debts should be paid, proceeds to give to her two nieces, Emily N. Willbor and Maria H. Willbor, five hundred dollars each, and to Thomas W. Smith two hundred dollars.

The legatee Emily N. Willbor died before the testatrices. The only heirs at law of the testatrices are Abbie R. Richards, Ann Elizabeth Clarke, Mary H. Adams, Sarah T. Bliven, and Maria H. Willbor.

Upon these facts the questions propounded are: 1. What is the amount of the legacies to which Maria H. Willbor and Thomas W. Smith are respectively entitled under the wills? 2. What portion of the estate of the testatrices passed to their heirs at law?

As all three of the testatrices lost their lives in the same disaster, and no fact or circumstance appears from which it can be inferred that either survived the others, the question of survivorship must be regarded as unascertainable, and hence

the rights of succession to their estates are to be determined as if death occurred to all at the same moment: *Underwood v. Wing*, 19 Beav. 459; 4 De Gex, M. & G. 633; *Wing v. Angrave*, 8 H. L. Cas. 183; *Wollaston v. Berkeley*, L. R. 2 Ch. Div. 213; *In re Wainwright*, 1 Swab. & T. 257; *Scrutton v. Pattillo*, L. R. 19 Eq. 369; *Coye v. Leach*, 8 Met. 371, 41 Am. Dec. 518; *Johnson v. Merithew*, 80 Me. 111, 6 Am. St. Rep. 162; *Newell v. Nichols*, 12 Hun, 604; 75 N. Y. 78, 81 Am. Rep. 424; *In re Hall*, 9 Cent. L. J. 381; *Russell v. Hallett*, 23 Kan. 276; *Ehle's Estate*, 73 Wis. 445; 24 Am. & Eng. Ency. of Law, 1027-1032.

If all three of the testatrices are to be regarded as having died at the same moment, it follows that the bequest and devise in each of their wills to the two sisters or either of the survivors did not take effect, there being no interval of time as between the deaths of the three during which titles to property could vest, and the wills therefore stand as if they contained only the bequests to the legatees subsequently named, to wit, Maria H. Willbor and Thomas W. Smith, the other legatee, Emily N. Willbor, having deceased without issue before the death of the testatrices.

We are therefore of the opinion: 1. That after the payment¹²⁸ of the debts of each testatrix Maria H. Willbor and Thomas W. Smith are entitled to the legacies of five hundred dollars and two hundred dollars respectively, bequeathed to them in each will, to be paid out of the personal estate of each testatrix if the personal estate is sufficient, and if insufficient that such legacies shall abate proportionately; 2. That the residue of the personal estate, if any, and the real estate of each testatrix, if any, passes as intestate estate to her next of kin and heirs at law.

SURVIVORSHIP.—IF TWO PERSONS PERISH in a common disaster, the question of survivorship, in the absence of evidence, is assumed to be unascertainable, and property rights are disposed of as if death occurred at the same time: See the monographic note to *Coye v. Leach*, 41 Am. Dec. 524, 525.

PARDEY v. AMERICAN SHIP WINDLASS COMPANY.

[20 Rhode Island, 147.]

INFANCY—CONTRACT OF MINORS.—A minor may bind himself by contract for necessities, if reasonable, or by a contract beneficial to him.

INFANCY.—CONTRACT OF APPRENTICESHIP entered into by a minor, with the consent of his father, containing reasonable provision for his compensation and instruction in a useful art, and that a certain sum per week shall be retained from his wages and paid to him at the end of the term, or forfeited if he shall leave the employment before the end of the term, or be discharged before that time for cause, is beneficial to the infant, and in all respects binding on him, and if, after reaching majority, he voluntarily leaves the employment before the end of his apprenticeship, the wages retained under the contract are forfeited by him.

H. W. Hayes, for the plaintiff.

A. Green, for the defendant.

148 MATTESON, C. J. This is assumpsit to recover money claimed to be due to the plaintiff for wages retained by the defendant, under the contract between them referred to below. The case is set forth in an agreed statement of facts as follows: The plaintiff entered the employment of the defendant April 17, 1893, under a contract by which he was to work for the defendant in the pattern-making business for the term of three years and a half. The defendant bound itself to pay the plaintiff for each day's labor of ten hours at the rate of sixty-six and two-thirds cents for the first year, eighty-three and one-third cents for the second year, one dollar for the third year, and one dollar and sixteen and two-third cents for the last half year, and also to give the plaintiff reasonable and proper instruction as a pattern-maker. The contract further provided that the sum of one dollar per week from the wages earned should be retained by the defendant till the end of the term, and should then be paid to the plaintiff with interest from the end of each year, but that if the plaintiff should leave the employment before the end of the term, or be discharged for cause, the money retained should be forfeited. At the time of entering the employment the plaintiff was a minor. The contract was signed by him and affirmed and approved by his father, Harold O. Pardey. The plaintiff attained his majority in July, 1895, and left the defendant's employment of his own accord September 7, 1895. The amount of wages retained under the contract, as shown by the defendant's books of ac-

count, is one hundred and twenty-four dollars. All other sums agreed to be paid under the contract have been paid.

The plaintiff proceeds on the theory that the contract was voidable because of his minority, and that as he did not ratify ¹⁴⁹ it on becoming of age, but avoided it, and as the wages specified in the contract were presumably the value of the labor performed, he is entitled to recover so much of them as the defendant has retained.

The plaintiff is mistaken in his supposition that the contract was voidable. For though it is true, generally, that a minor cannot bind himself by his contracts for want of legal capacity, it is equally well settled that he may bind himself by a contract for necessities, if reasonable, or by a contract beneficial to him: *Stone v. Dennison*, 13 Pick. 6, 23 Am. Dec. 654; *Cooper v. Simmons*, 7 Hurl. & N. 719; *Schouler on Domestic Relations*, 5th ed., secs. 410, 411. The contract before us fulfills these requirements. It is a contract for necessities, and is beneficial to the plaintiff, since it stipulates for his instruction in the useful art of pattern-making, by which he would be better able to earn a livelihood. In *Coke on Littleton*, 172a, it is laid down that "an infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessities, and likewise for his good teaching or instruction whereby he may be profited himself afterward." In *Middlebury College v. Chandler*, 16 Vt. 683, 42 Am. Dec. 537, the court held that a common school education was to be regarded as necessary, but that a collegiate education was not *prima facie* so, though it might be shown to be in a particular case. The court, however, limited its opinion strictly to a collegiate education, saying that it was not to be understood as referring to professional studies or to "the education and training which is requisite to the knowledge and practice of the mechanic arts," which "partake of the nature of apprenticeships and stand on peculiar grounds of reason and policy." And see *Cooper v. Simmons*, 7 Ex. 719, in which the indenture of apprenticeship provided for the instruction of the infant in the art of a rim and mortice lockmaker, and in which it was held that the apprentice was bound by his contract of service.

The contract in the present instance was made with the sanction of the plaintiff's father, and there is nothing in the case as stated to show that the rate of compensation provided in it was not fair and reasonable, or that the retention of the ¹⁵⁰ one dollar per week until the completion of the term of

service, the purpose of which, we presume, was to insure the plaintiff's performance of his contract, was not also reasonable.

As the contract was binding on the plaintiff and he has violated it by leaving the employment, he must be considered to have forfeited the wages retained as provided by the contract, and hence judgment must be rendered for the defendant for its costs.

Case remitted to the district court of the sixth judicial district, with direction to enter judgment for the defendant for costs.

ALL CONTRACTS OF AN INFANT, except those for necessities, are voidable by him within a reasonable time after he becomes of age: *Englebert v. Troxell*, 40 Neb. 185, 42 Am. St. Rep. 685. See the monographic note to *Craig v. Van Bebber*, 18 Am. St. Rep. 571-724, on contracts of infants.

APPRENTICESHIP.—AN INFANT MAY BIND himself as an apprentice, it is said, because the contract is for his benefit. Yet whatever binding effect such a contract may have is due to statutes. At the common law, it is voidable by the infant, like his other contracts: See the monographic note to *Craig v. Van Bebber*, 18 Am. St. Rep. 626.

ISLAND SAVINGS BANK v. GALVIN.

[20 Rhode Island, 158.]

MORTGAGES—FORECLOSURE SALE—EQUITABLE ESTOPPEL.—If mortgaged property is of sufficient value to pay the mortgage debt, and the mortgagee permits the property to be sold under foreclosure in order that his representative may purchase it for less than its fair market value, such mortgagee is equitably estopped from recovering the balance due on the mortgage note.

Assumpsit for the balance due on a mortgage note after sale of the premises under foreclosure.

W. P. Sheffield, Jr., for the plaintiff.

C. A. Ives, for the defendant.

158 PER CURLAM. The plea sets up by way of equitable defense that the plaintiff permitted the partnership property, on which it held a mortgage as security for the note in suit, to be sacrificed at the mortgagee's sale, through the action of its treasurer, Edward Newton, to the end that said Newton might purchase the property for greatly less than its fair market value, which was more than enough to pay the amount due on the note. The demurrer admits these allegations.

We think that the defense is good, in that it sets up an equitable estoppel founded on the conduct of the plaintiff, whereby a deficiency has arisen which the plaintiff was the means of creating: *Innes v. Stewart*, 36 Mich. 285; *In re Collins*, 17 Hun, 289; *Equitable Life Ins. Soc. v. Stevens*, 63 N. Y. 341.

Demurrer overruled, and case remitted to the common pleas division for further proceedings.

FORECLOSURE.—A MORTGAGEE BECOMING PURCHASER for less than the judgment has a lien upon the property prior to that of the redemptioner for the balance unpaid: *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655. But collusion between a mortgagee and a third person, by which the latter is to bid off the property for the use of the mortgagee, vitiates the sale: See the monographic note to *Wygall v. Bigelow*, 16 Am. St. Rep. 499; *Blockley v. Fowler*, 21 Cal. 326, 82 Am. Dec. 747.

HENSON v. BECKWITH.

[20 Rhode Island, 165.]

LANDLORD AND TENANT—ELEVATOR ACCIDENT.—If the lessee of a building containing a freight elevator, and fit for the purposes for which it is leased, covenants to keep the interior in repair, the lessor to have no control over the elevator nor the right to make alterations, the latter is not liable for an injury to a third person caused by or about such elevator while he is upon the leased premises under invitation of the lessee and not of the landlord.

LANDLORD AND TENANT—LIABILITY TO STRANGER. A landlord out of possession is liable to a stranger for the defective conditions of premises under lease, when they are a nuisance when leased, or in the nature of things must become so by their use, or when the premises are let to be used for purposes for which they are not fit or safe, and this was known, or ought to have been known, to the landlord at the time of making the lease.

LANDLORD AND TENANT—LIABILITY TO THIRD PERSON.—If premises at the time when leased are not a nuisance nor unfit for the purposes for which they are leased, and injury happens to some guest of the tenant, through some act of the latter, or while he has sole possession of the premises, the landlord is not liable therefor.

ELEVATORS INTENDED AND USED FOR FREIGHT TRANSPORTATION are in themselves warning that they are not intended for the use or safety of passengers.

LANDLORD AND TENANT—ELEVATOR ACCIDENT.—If the tenant of a building containing a freight elevator under his sole control invites a stranger to use it, he, and not the landlord, must give warning and look out for the safety of his guest, or respond in damages for his injury, if any are recoverable.

E. D. Bassett and E. L. Mitchell, for the plaintiff.

H. Almy and J. C. Ely, for the defendant.

¹⁰⁰ STINESS, J. The declaration alleges that the defendant, owner of a building known as the Owen Building, on Dyer street, in the city of Providence, on April 3, 1895, and for a long time prior thereto, knew of a dangerous defect in the construction of the elevator well therein, by leaving a large opening between the elevator and the outer wall; that while the plaintiff's intestate was delivering goods, on said April 3d, to a tenant in the building by his invitation, and while in the exercise of due care, said intestate fell through the opening and was killed.

The defendant demurs to the declaration for lack of material averments; but as these could be supplied by amendment, and as the real question of the case arises in a broader way upon the defendant's plea, to which the plaintiff demurs, we will consider the whole case as it is shown by the pleadings.

The plea sets up the fact that, excepting a small store, the whole building, together with the elevator, was under lease from January 1, 1895, to December 31, 1899, with covenant by the lessee to keep the interior in repair, and that the defendant had no control over the elevator nor the right to make alterations. The case as thus stated raises the question of a landlord's liability to a stranger for the defective condition of premises under lease.

In *Joyce v. Martin*, 15 R. L. 558, this court recognized three classes of cases of this sort: 1. Where the owner leases premises which are a nuisance, or must, in the nature of things, become so by their use, then, whether in or out of possession, he is liable for injuries resulting from such nuisance; 2. Where premises are let for rent or profit to be used for purposes for which they are not fit or safe, and all this was known or ought to have been known to the lessor, he is also liable for injuries resulting from such use; 3. ¹⁶⁷ Where property, at the time of a demise, is not a nuisance, and an injury happens by some act of the tenant or while he has entire possession and control of the premises, the owner is not liable.

These three rules seem to us to be both comprehensive and correct. Our inquiry, therefore, is to which class the case at bar belongs.

The first class of cases includes those where an owner has, by an express or implied invitation, brought persons to dan-

ger and injury, under conditions which amount to a nuisance. Examples of this kind are found in *Gordon v. Cummings*, 152 Mass. 513, 23 Am. St. Rep. 846, where an owner maintained a common hallway for his tenants, to which a letter carrier was thereby invited; *Learoyd v. Godfrey*, 138 Mass. 315, where an owner maintained an uncovered well in a passageway to a house, to which a police officer was held to be invited; *Larne v. Farren Hotel Co.*, 116 Mass. 67, *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603, and *Tomle v. Hampton*, 129 Ill. 383, which were cases of holes in or adjacent to a public walk; and *House v. Metcalf*, 27 Conn. 631, where an overshot water wheel, so near the road as to frighten horses, was held to be a nuisance. *Wendell v. Baxter*, 12 Gray, 494, *Moody v. New York*, 43 Barb. 282, *Albert v. State*, 66 Md. 325, 59 Am. Rep. 159, like *Joyce v. Martin*, 15 R. I. 558, were cases of piers or wharves to which the public were held to be invited.

Of the second class, *Carson v. Godley*, 26 Pa. St. 111, 67 Am. Dec. 404, is an example, the building having been unfit for the purpose for which it was let.

We think it is clear that the case at bar does not fall within the first of these classes. The defect complained of was not in or near a public way, nor in a part of the premises held out by the owner for the entry of strangers, so as to amount to an invitation to a place which is a nuisance. The term "nuisance," in legal phraseology, "is applied to that class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal, . . . working an obstruction of, or injury to, a right of another or of the public": Wood's Law of Nuisances, sec. 1. One has the right to erect a building, in general terms, as he ¹⁶⁸ pleases, and even if there be dangerous places in it he violates no right of other people in so doing. If he invites others into such a building he is, to some extent, responsible for their safety; but the building is not on that account a nuisance. So one has the right to hire such a building, and, under the same limitations, he does not thereby maintain a nuisance.

Nor is the case at bar within the second class of cases above described. It does not appear that the building was unfit for the purposes for which it was let. The defect complained of was open and obvious. It could easily have been guarded against by warning or a barrier. Being a freight elevator, it was of itself a warning that it was not intended for the safety of passengers, and equally so was it a warning to those at

work upon it. The injury was not caused by any defect in the elevator itself. Such elevators are now in common use, and it is a matter of common knowledge that they are more or less unprotected at the sides. The declaration does not state whether the plaintiff's intestate was an employé of the lessee or a stranger, but it seems to imply the latter in stating that he entered upon the invitation of a tenant in said building. If he was an employé, the rule of *Kelley v. Silver Spring etc. Co.*, 12 R. I. 112, 34 Am. Rep. 615, that one who works exposed to a manifest danger cannot look to his employer if he is injured, would apply with stronger reason to exonerate the lessor or the employer. If he was a stranger, on the premises at the invitation of a tenant, the case falls within the third class described above, and the owner is not liable.

In *Harpel v. Fall*, 63 Minn. 520, the rule is stated that where there is no agreement to repair leased premises by the landlord, and he is not guilty of any fraud or concealment as to their safe condition, and the defects in the premises are not secret, but obvious, the tenant takes the risk of their safe occupancy; and the landlord is not liable to him or to any person entering under his title or who is upon the premises by his invitation for injuries sustained by the unsafe condition of the premises.

To the same effect are *Freeman v. Hunnewell*, 163 Mass. 210; *Leonard v. Storer*, 115 Mass. 86, 15 Am. Rep. 76; *Mellen v. Morrill*, 126 Mass. 545, 30 Am. Rep. 695; *Davidson v. Fischer*, 11 Colo. 583, 7 Am. St. Rep. 267.

Shearman and Redfield on Negligence, fourth edition, section 711, states the rule and the reason for it thus: "Those who claim upon the ground that they were invited into a dangerous place must seek their remedy against the person who invited them. If they are the guests of the tenant, he, and not the landlord, is the person from whom they must seek redress for injuries caused by any defects in the premises, even though the defects existed when the lease was made; for such persons would never have suffered any injury from these defects if they had not entered the premises; and the entry was not made at the request of the landlord or any agent of his." Bearing in mind the distinction of cases such as those cited above, where an invitation by the landlord may be implied, this rule limits the liability of lessor and lessee to his own acts with reference to a stranger.

Do the facts in this case amount to an implied invitation by the landlord? We think not. In *Gordon v. Cummings*, 152 Mass. 513, 23 Am. St. Rep. 846, and *Learoyd v. Godfrey*, 138 Mass. 315, the landlords were in control of the dangerous passageways and so themselves held out the invitation to enter. So in places where the public go the owner is held liable because of his participation in a nuisance.

But it would be a startling proposition that every owner who has leased property to others is liable for its absolute security, at the time of letting, to every person whom a tenant may invite to the premises, when such owner can neither have knowledge of such entry nor the chance for warning or protection. We do not think that the law goes to this extent, yet such a proposition would be necessary to sustain the present case.

Ordinarily, a freight elevator is used by employes. Can it be said that a landlord is bound to know that it will be used by strangers? The tenant and his servants, knowing its condition, may use it carefully and safely. If, then, the tenant invites a stranger to use it, he is the one who should give warning and look out for the safety of his guest. We are unable to see how the landlord, in such a case, can be ¹⁷⁰ held responsible, without saying that nobody has a right to let property that is in any way dangerous or out of repair, even though the lessee may be willing to take it as it is and be able to use it with safety, having knowledge of the risk. Such a doctrine would be a serious limitation upon the ownership of real property.

For these reasons we conclude that, as the building in question was not a nuisance, nor unfit for the purpose for which it was let, by reason of any secret defect which the landlord may be presumed to know, and as the plaintiff's intestate was not upon the premises by invitation of the defendant, express or implied, and as the defendant was not in possession or control of the elevator well, the plaintiff shows no right of action against the defendant.

The demurrer to the defendant's plea is overruled, and the demurrer to the declaration is sustained. Case remitted to the common pleas division for further proceedings.

DEFECTIVE PREMISES.—THE LIABILITY OF A LANDLORD letting premises in a defective and dangerous condition is considered in the monographic note to *Willcox v. Hines*, 66 Am. St. Rep. 785-789.

ELEVATORS.—THE LIABILITY OF OWNERS of elevators is considered in the monographic note to *Southern etc. Assn. v. Dawson*, 56 Am. St. Rep. 806-810. A tenant of a building who uses the elevator in his business is liable for injuries to his servant arising from its defective condition: *Oberfelder v. Doran*, 26 Neb. 118, 18 Am. St. Rep. 771. But a landlord is answerable for the safe condition of an elevator if he retains control over it and its approaches, particularly if he has covenanted to keep it in repair: *Olson v. Schultz*, 67 Minn. 494, 64 Am. St. Rep. 437; or if he has knowledge of a latent mechanical defect therein, not discoverable by the tenant in the exercise of reasonable care: *Anderson v. Hayes*, 101 Wis. 538, 70 Am. St. Rep. 930.

GARRATT FORD COMPANY v. VERMONT MANUFACTURING COMPANY.

[20 Rhode Island, 187.]

CORPORATIONS, FOREIGN — NONCOMPLIANCE WITH STATUTE—RIGHT TO SUE.—A foreign corporation which has failed to comply with a statute requiring it to appoint a resident of the state as its attorney, upon whom service of process against it may be made, and providing a penalty for noncompliance, may nevertheless maintain a suit within the state to recover a just debt due it from a resident thereof.

E. D. Bassett and E. L. Mitchell, for the plaintiff.

C. Lee and F. W. Tillinghast, for the defendant.

¹⁸⁷ **STINESS, J.** The plaintiff, a corporation located in Boston, Massachusetts, sold to the defendant a tank, through a salesman who took the order in Providence, and it now seeks to recover the price in this suit. The defendant asked the judge presiding at the trial to charge that the plaintiff, being a foreign corporation which had not complied with the law of this state in appointing a resident of this state as its attorney (Gen. Laws, cap. 253, secs. 36-41), was not entitled to maintain this action. To the refusal of the judge so to charge the defendant asks for a new trial on the ground of erroneous ruling.

The question whether a corporation of one state can do business in another state without complying with the laws of such state is one which has frequently arisen and upon which decisions are conflicting, although many decisions turn upon the language of a statute. Thus it is held that a statute prohibiting a foreign corporation from doing business in a state without complying with its terms makes such business ¹⁸⁸ illegal and void, and that no such corporation can maintain an

action to enforce its illegal contracts. And where the statute does not provide for the consequences of noncompliance, the argument is that the acts of the corporation must be void or else the statute would be nugatory. In Massachusetts a penalty is imposed upon the agent doing business; but the statute (Laws 1884, cap. 330, sec. 3) says that a failure to comply with the conditions shall not affect the validity of an act of the corporation: *Rogers v. Simmons*, 155 Mass. 259. Some statutes declare the acts to be void. In such cases there can be no question of validity. Some cases hold that where the statute imposes a penalty upon the agent, but is silent as to the validity of the act, it is to be presumed that the legislature intended the penalty as a sufficient safeguard for compliance, and that to declare the acts of the corporation void would go further than the statute and impose an additional penalty, by construction, which should not be done. A notable case of this kind is *Fritts v. Palmer*, 132 U. S. 282, in which the court says: "The fair implication is that, in the judgment of the legislature of Colorado, this penalty was ample to effect the object of the statutes prescribing the terms upon which foreign corporations might do business in that state. It is not for the judiciary, at the instance or for the benefit of private parties claiming under deeds executed by the person who had previously conveyed to the corporation, according to the forms prescribed for passing title to real estate, to inflict the additional and harsh penalty of forfeiting, for the benefit of such parties, the estate thus conveyed to the corporation and by it conveyed to others. . . . If the legislature had intended to declare that no title should pass under a conveyance to a foreign corporation purchasing real estate before it acquires the right to do business in the state, and that such a conveyance should be an absolute nullity as between the grantor and grantee, leaving the grantor to deal with the property as if he had never sold it, that intention would have been clearly manifested." To the same effect are *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67, and *Edison etc. Co. v. Canadian etc. Co.*, 189 8 Wash. 370, 40 Am. St. Rep. 910, with a note which holds the contrary view. See, also, an instructive article by Mr. Gumm in *American Law Register*, January, 1897, page 19. Without multiplying authorities, we think that the reasoning which we have quoted is conclusive, although we concede that the greater number of authorities are probably the

other way. We think, moreover, that we find support for this view in similar legislation in this state.

In General Laws of Rhode Island, caption 182, section 17, it is declared in the case of a foreign insurance company that the contract shall be valid, and the same declaration is made as to resident insurance companies which fail to comply with the law. The argument is pressed that because this declaration of validity is made in these cases, its omission in the statute before us leads to the inference of the invalidity of other contracts. We do not think that the legislature intended to make one class of contracts valid and other contracts, under similar conditions, invalid. If the legislature intends to make such contracts as the one in suit invalid, it is easy to say so; but in the absence of such a provision, it is a wide stretch of judicial construction for the court to hold that such a result was intended. The purpose of the statute is not to invalidate contracts, but to require foreign corporations to appoint an attorney in this state upon whom service of process may be made. This purpose seems to be adequately served by imposing a penalty upon the agent who ventures to do business for the company without complying with the law. While we do not question the right of the state to impose such conditions and penalties upon foreign companies doing business here as it may deem proper, subject to the provisions of the federal constitution as to the regulation of commerce among the states, yet, in view of the vast amount of business now done by such corporations, we think it is a conservative position to hold that the legislature did not intend to exempt our citizens from paying just debts, upon grounds of noncompliance with our statutes, which may have been fully known to the debtors, when the general assembly has not clearly expressed that intention and the inference of it is not necessary to the object of the statute.

¹⁹⁰ We are referred to *Electric News etc. Co. v. Perry*, 75 Fed. Rep. 898, in which it is claimed that our statute was construed to preclude a foreign corporation, which had not complied with it, from maintaining a suit. That case, however, was a bill in equity for an injunction to restrain police officers of Pawtucket, who had seized the property of the complainant for a violation of our statute against pool-selling, from interfering with their business. Judge Colt, in the opinion, very properly said that a foreign corporation, which has not complied with statutory provisions, "cannot invoke the aid of

this court to prohibit the defendants from interfering with a business which it has no legal right to carry on." That is a very different thing from holding that a contract is void which in its nature is not contrary to public policy.

Our decision is that the court did not err in refusing the instruction asked for, and that the petition for a new trial must be dismissed.

Case remitted to the common pleas division with direction to enter judgment on the verdict.

FOREIGN CORPORATION—NONCOMPLIANCE WITH STATUTE.—A foreign insurance corporation, prohibited by statute from doing business in the state without first complying with certain regulations and conditions, cannot maintain an action therein on a contract of insurance without compliance with such requirements: *Seamans v. Temple Co.*, 105 Mich. 400, 55 Am. St. Rep. 457; *Swing v. Munson*, 191 Pa. St. 582, 71 Am. St. Rep. 772. But see *State etc. Ins. Assn. v. Brinkley etc. Co.*, 61 Ark. 1, 54 Am. St. Rep. 191; *Foster v. Betcher Lumber Co.*, 5 S. Dak. 57, 49 Am. St. Rep. 859.

CARR v. BROWN.

[20 Rhode Island, 215.]

CONSTITUTIONAL LAW.—ADMINISTRATION UPON THE ESTATE OF A LIVING PERSON is a deprivation of property without due process of law. Hence, a statute authorizing the estate of a living person, because of his absence for a certain time without being heard from, to be administered upon as if he were dead is unconstitutional and void.

CONSTITUTIONAL LAW.—DUE PROCESS OF LAW means a course of legal proceedings according to rules and principles under an established system of jurisprudence for the protection and enforcement of private rights, requiring a court of competent jurisdiction to pass upon the subject matter of the proceedings and a trial or proceeding in which the rights of the parties, after notice and opportunity to be heard, shall be duly adjudicated.

EXECUTORS AND ADMINISTRATORS—ADMINISTRATION ON ESTATE OF LIVING PERSON.—NO COURT HAS, NOR CAN HAVE, JURISDICTION to grant letters of administration on the estate of a living person, though he may be supposed to be dead. Such grant of letters, as well as the administration, is absolutely null and void.

A. B. Crafts, for the plaintiff.

N. B. Lewis and D. B. Potter, for the defendants.

215 **TILLINGHAST, J.** This is an action of assumpsit to recover money which came to the hands of the defendants from

the ²¹⁶ plaintiff's estate, which has been administered upon during his lifetime. The defendants have filed special pleas in bar, in which they set up that more than seven years before letters of administration were taken out on plaintiff's estate he had left his home in South Kingstown, where he was a domiciled inhabitant, and that during all of said time he had not been heard from either directly or indirectly; that notice of intention to apply for letters of administration by Briget McGuire, a sister of the plaintiff, was given for the period of three months; that further notice by publication was afterward ordered and given by the probate court, and that thereupon, upon proof to the satisfaction of said court that notice had been given for three months as aforesaid, and also that said additional notice had been given as ordered, it was adjudged that the petition be granted; and the defendant, John A. Brown, was thereupon appointed administrator on the estate of the plaintiff. The pleas further set up that said Brown thereupon proceeded to administer upon said estate in the usual way; that he settled his account with the probate court, and thereupon, after three years from the time when said administration was granted, he distributed said estate according to law. Wherefore he prays judgment, etc.

To these pleas the plaintiff demurs on the grounds: 1. That the proceedings in the court of probate recited in said pleas were and are null and void, as the plaintiff was then and now is living; 2. That to take and appropriate the estate of a living person in the manner described in said pleas would be to take private property without due process of law, and such a construction of the statute would be contrary to the constitution of this state; 3. That said court of probate acquired no jurisdiction of the plaintiff's personal property and estate.

The action of the probate court and the proceedings in connection therewith were had in pursuance of the Public Laws of Rhode Island, caption 298, passed April 18, 1882, which is as follows: "Whenever it shall be proved to the satisfaction of the court of probate of any town that any person domiciled in such town at the time of his departure has left his home and not been ²¹⁷ heard from, directly or indirectly, for the term of seven years, and that a notice of intention to apply for letters of administration or to prove the last will and testament of such person has been published for three months in each issue of some newspaper in the city of Providence, and also in each issue of some newspaper in the county in which he

was domiciled, and been posted for three months in three or more public places in said town, and that such other notice as the court may deem best has been given to the relations and heirs, the last will and testament of such person may be proved, and letters of administration may be granted on such person's estate as if he were dead. The notices shall contain a brief description of such person, his age, name, and such other characteristics as shall identify him, and no distribution of his estate shall be made until three years after administration has been granted under the provisions of this section." Public Statutes of Rhode Island, caption 184, section 9, which is a continuation of the same subject, is as follows: "If such person shall afterward return to this state, or shall constitute an agent or attorney to act in his behalf, the executor or administrator as aforesaid shall be accountable for, and shall deliver to such person or his lawful agent or attorney, all the estate of every kind which shall then be in his hands as executor or administrator as aforesaid, after deducting such sum or sums as the court of probate shall allow, in the settlement of his accounts, for any payments or disbursements which he may have legally made in his said capacity, or which said court of probate may think reasonable to allow for his personal trouble in executing the trust of executor or administrator as aforesaid."

Although statutes of similar import have existed in this state for more than a century, no case of this sort has ever before arisen thereunder, so far as we are aware; and we are therefore called upon to decide the question raised without the aid of former adjudications, so far as our own state is concerned. For although this statute was before the court in *Southwick v. Probate Court of Middletown*, 18 R. I. 402, yet it was only in connection with the question of the sufficiency of the notice to prove the will in question, ²¹⁸ and hence the decision in that case has no bearing upon the question as to the constitutionality of the law.

It will be observed that said statute does not require the probate court to find that the person whose estate is sought to be administered is dead before proceeding to exercise jurisdiction, but only that he has been absent from his home without being heard from directly or indirectly for the period of seven years. This fact being made to appear, the court is given jurisdiction, after the required notice is given, to proceed as if the person were dead. The main question which is

out due process of law, or how it can be necessary or reasonably proper for the proper government of the persons and the property within the jurisdiction of the state." This decision is cited with approval by the supreme court of the United States in *Scott v. McNeal*, 154 U. S. 34, 49.

The general question as to whether any court has or can have jurisdiction to grant letters of administration on the estate of a living person has been much discussed, and while the authorities are not entirely harmonious, yet the great weight thereof is clearly against the existence of any such jurisdiction. The ground upon which most of the decisions rest is that, in order to confer jurisdiction upon a court to grant letters of administration upon a person's estate, that person must be in fact dead; and that if he is not dead there is no estate to administer upon, and hence no jurisdiction. Mr. Freeman, in discussing this question in his work on *Judgments*, says: "The question occasionally arises whether ²²¹ the grant of letters testamentary or of administration on the estate of a person in fact living, but supposed to be dead, is an act beyond the jurisdiction of the court, and, therefore, so utterly void that no person is protected in dealing with the executor or administrator while his letters remain unrevoked. The weight of authority is very decidedly to the effect that the decease of the supposed decedent is a prerequisite to the jurisdiction of the court, and that he is wholly unaffected by the proceedings for the settlement of his estate." In line with the doctrine here announced, it is said in *Melia v. Simmons*, 45 Wis. 334, 30 Am. Rep. 746: "The proceedings of administration, settlement, and assignment of the estate of the respondent, represented to have been dead when he was and still is alive, are absolutely null and void, for all purposes whatsoever. . . . The county court of Dodge county or any other court has no jurisdiction in this particular case or in such a class of cases. There is no class of cases which embraces the administration of the estates of living persons as if they were dead. The proceedings are void ab initio and throughout. If this case falls within any class of cases, it is a class in which no court has any right to deliberate or render any judgment, and in which every conceivable act is an absolute nullity. The only jurisdiction the county court has in respect to the administration of estates is over the estates of dead persons. It would seem that the bare statement of such a proposition is enough, without citing authorities." In *Thomas v. People*, 107 Ill. 517,

521, 47 Am. Rep. 458, the supreme court of Illinois, in an able opinion by Mr. Justice Mulkey, takes the same view. The same doctrine has been either adjudged or recognized in Massachusetts in *Jochumsen v. Suffolk Sav. Bank*, 3 Allen, 87; *Waters v. Stickney*, 12 Allen, 1, 13, 90 Am. Dec. 122; *Day v. Floyd*, 130 Mass. 488; in Pennsylvania, in a series of cases beginning in 1824: See *Devlin v. Commonwealth*, 101 Pa. St. 273, 47 Am. Rep. 710; in Texas, in *Withers v. Patterson*, 27 Tex. 491, 499, 86 Am. Dec. 643; in Kentucky, in *French v. Frazier*, 7 J. J. Marsh. 425; in Tennessee, in *D'Arusment v. Jones*, 4 Lea, 251, 40 Am. Rep. 12; in New Hampshire, in *Morgan v. Dodge*, 44 N. H. 255, 82 Am. Dec. 213; in North Carolina, in *State v. White*, 26 N. C. 116; in Alabama, in *Duncan v. Stewart*, 25 Ala. 408, 60 Am. Dec. 527; in California, in *Stevenson v. Superior Court*, 62 Cal. 60; in Missouri, in *Johnson v. Beazley*, 65 Mo. 250, 264, 27 Am. Rep. 276; and in many other states. See, also, 1 Woerner's American Law of Administration, section 208 et seq., where the same view is taken and our statute commented on, and note to *Bolton v. Schriever*, 135 N. Y. 65, 18 L. R. Ann. 242. To this array of authorities there are to be added the decisions of the supreme court of the United States in *Griffith v. Frazier*, 8 Cranch, 9, and the recent case of *Scott v. McNeal*, 154 U. S. 34, in which last-named case Gray, J., in an exhaustive and learned opinion, after discussing the entire subject and reviewing all the cases, comes to the conclusion that administration cannot legally be granted on the estate of a living person, and that to deprive one of his property in a proceeding of this sort is unconstitutional. The reasoning in that case is so cogent and the result so authoritative, especially as to the constitutional question involved in the case at bar, that further citations would seem to be unnecessary.

Opposed to all this there is practically, so far as we are aware, but the single case of *Roderigas v. East River Sav. Inst.*, 63 N. Y. 460, 20 Am. Rep. 555, where the court, by a bare majority, held that, under the provision of the statutes of that state conferring upon surrogates jurisdiction over the subject of granting letters of administration, the inquiry of the surrogate as to the death of the person, upon whose estate administration is applied for, is judicial in its nature; and that the surrogate has jurisdiction to determine it upon sufficient evidence, and also that letters issued by him upon due proofs are conclusive evidence of the authority of the administrator

to act until the order granting them is reversed on appeal or the letters are revoked or vacated, so far at least as to protect innocent persons acting upon the faith thereof. The decision in that case has been much criticised (see articles in 21 Albany Law Journal, pp. 65, 84; D'Arusment v. Jones, 4 Lea, 251, 40 Am. Rep. 12; 15 Am. Law Reg. 1; 1 Woerner's American Law of Administration, sec. 210), and, so far as we are aware, has never been followed outside of said state except in the case of Scott v. McNeal, 154 U. S. 34, in Washington Territory, which, as we have already seen, has since ²²³ been expressly overruled by the supreme court of the United States, although it was cited with approval in Plume v. Howard Sav. Inst., 46 N. J. L. 211, 230. In that case, however, it was not even surmised that the alleged decedent was not in fact dead.

We are not unmindful of the rule that has been laid down in this state and elsewhere that the court should ponder well before declaring an act of the general assembly to be unconstitutional, and that it should resolve every doubt in favor of the validity of the act: State v. District of Narragansett, 16 R. L. 424, 440. But if, having observed this rule, the court comes to the conclusion that the act is violative of some constitutional right, its plain and imperative duty is to declare it to be void: Taylor v. Place, 4 R. L. 324. The case was originally heard by the appellate division, which then consisted of three justices. Owing to the importance of the question, however, and in view of the fact before referred to that said statute has long been upon the statute book, it was thought proper to have the case resubmitted on briefs to the entire court, which has been done. And after a full and careful consideration, we are all of the opinion that, in so far as said statute authorizes the estate of a living person to be administered upon, it is unconstitutional and void.

We do not wish to be understood in what we have said in this case as expressing any opinion upon the validity of the statute which authorizes administration upon the estates of persons under imprisonment for crime.

Demurrer sustained and case remitted to the common pleas division for further proceedings.

ADMINISTRATION GRANTED UPON A LIVING person's estate is an absolute nullity: Springer v. Shavender, 118 N. C. 33, 54 Am. St. Rep. 708. Compare Scott v. McNeal, 5 Wash. 309, 34 Am. St. Rep. 863.

ESTATES OF DECEDENTS.—THE CONSTITUTIONALITY OF STATUTES authorizing the sale of the property of deceased persons is considered in the monographic notes to *Bank v. Cooper*, 24 Am. Dec. 542; *Estate of Porter*, 129 Cal. 86, 80 Am. St. Rep.

DUE PROCESS OF LAW MEANS in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights: *Burdick v. People*, 149 Ill. 600, 41 Am. St. Rep. 329. It requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights: *State v. Billings*, 55 Minn. 467, 43 Am. St. Rep. 525. See, further, the monographic notes to *Bardwell v. Collins*, 20 Am. St. Rep. 554; *Bank v. Cooper*, 24 Am. Dec. 537-545.

STATE v. BAKER.

[20 Rhode Island, 275.]

ASSAULT.—FIRING A PISTOL in the direction of another, within the distance in which it may do execution, with the intention of frightening him, or with the intention of wounding him, are equally assaults.

ASSAULTS ARE ANY UNLAWFUL ATTEMPTS OR OFFERS with force and violence to do a corporal hurt to another, whether from malice or wantonness. The offense may also consist in putting another in fear of violence. Battery is not a necessary element of assault.

ASSAULT WITH A DANGEROUS WEAPON is committed whenever such weapon is presented at the person intended to be assaulted within the distance at which it may do execution. Malice is implied from the act.

W. B. Tanner, attorney general, and C. F. Stearns, assistant attorney general, for the plaintiff.

C. H. Page and C. H. Page, Jr., for the defendant.

275 TILLINGHAST, J. The defendant, who has been found guilty of committing an assault with a dangerous weapon upon Jerry G. Fournier, petitions for a new trial on the grounds: 1. That the presiding justice erred in refusing to give the following instruction to the jury, viz.: "If the jury believe from the testimony that the defendant fired the pistol for the purpose of scaring Mr. Fournier, and for no other purpose, the defendant was not guilty of an assault with a dangerous weapon, as charged in the indictment, but only guilty of a simple assault"; 2. That the verdict was against the evidence and the weight thereof; 3. That the verdict was against the law; and 4. That the defendant has discovered new evidence material to

the issue in said case, since the trial thereof, that he could not have discovered by the exercise of reasonable diligence prior thereto.

The witnesses on the part of the state testify, substantially, that on the fifteenth day of December, 1896, at East Providence, in this county, at about 12 o'clock in the daytime, while said Fournier was engaged in attending to some work in his yard, the defendant, who had a grudge against him, came to the ²⁷⁶ fence, drew a loaded revolver from his pocket, and deliberately fired the same into said yard, in the direction of the place where said Fournier was standing, which was about sixty feet away, the ball striking a tree in the rear of him, but fortunately doing no harm. Fournier testifies that he heard the whistle or whizz of the ball as it passed him. At the time of the shooting Fournier's back was toward the defendant, so that he did not see him or know of his presence until after the shot was fired. There is also evidence on the part of the state that the defendant had had trouble with Fournier, and that he had on several occasions within a day or two previous to the occurrence in question threatened to shoot him, or words to that effect, and there is also evidence that the defendant admitted after the shooting that he shot at the said Fournier. Franklin Monroe, the sergeant of police, who arrested the defendant, testifies that in a conversation with defendant after his arrest he said: "I did shoot at him—I shot at him with lead." To another officer he stated that he shot at Fournier to scare him, and that the next time he would fill him full of lead.

The defendant testifies that he fired the pistol in the air, for the purpose of scaring Fournier, and not with any intention of assaulting him; that Fournier had annoyed him considerably, and he thought he would just fire off the pistol and see what he said.

The court, Douglas, J., charged the jury, amongst other things, that "firing such a weapon intentionally in the direction of another person is assaulting him; and, therefore, the defendant, if he intentionally did this act, is guilty of the offense charged. His defense is that he did not intend to wound the citizen, but only to scare him. . . . Firing a pistol in the direction of another with the intention of frightening him, or with the intention of wounding him, are equally assaults. If a wound ensues, that would give rise to a civil action for assault and battery. The criminal law looks at the

intent of the act, and if the intent is either to bruise, wound, or frighten, it is the same, so far as the crime is concerned. There must be an intent to commit an assault or ²⁷⁷ else there [can be no assault. Committing an assault need not be wounding. It may consist in frightening as well. Now, the defendant himself tells you that he did not intend to wound, but he did intend to frighten. He tells you that he fired the pistol, and whether he fired it in the direction of this man or not is for you to determine on all the evidence in the case. . . . He himself does not deny that he pointed it in the direction, but says he fired it in the air—whatever that may mean. But he does say that he intended to scare this man. . . . Have you any reasonable doubt that the defendant fired this pistol in the direction of the man he is charged with firing it at either to wound or to scare? If the evidence convinces you of this, then the defendant is guilty. . . . You have simply to ask yourselves this question: Does the evidence convince you that the defendant fired the pistol at, or in the direction of, the person named, with the intention of either wounding him or frightening him? And what the intention was, gentlemen, you have a right to infer from the act. If a man fires a pistol in the direction of another person it is a fair inference, unexplained, that the act had some reference to the person that the pistol was pointed at, and the natural motive is the motive which you have a right to attribute to the person who commits the act.” The court also charged the jury, in compliance with the defendant’s request: “That the jury must find from the testimony that this defendant fired the pistol with the intention of committing an assault upon Mr. Fournier before they can find a verdict of guilty as charged in the indictment.”

We think the court fairly and substantially stated the law applicable to the case. An assault, as ordinarily defined, is any unlawful attempt or offer, with force or violence, to do a corporal hurt to another, whether from malice or wantonness. The offense may consist, also, in putting another in fear of violence. Thus it is said by Mr. Bishop that: “An assault is any unlawful physical force, partly or fully put in motion, creating a reasonable apprehension of immediate physical injury to a human being”: 2 Bishop’s Criminal Law, sec. 23. And see *State v. Gorham*, 55 N. H. 152. In *Rapalje’s Law Dictionary*, ²⁷⁸ under the word “assault,” both definitions are recognized. To constitute an assault with a dangerous weapon it is necessary that the weapon should be presented at the party intended

to be assaulted, within the distance at which it may do execution: 1 McLain's Criminal Law, sec. 232, p. 199, and cases cited in note 4. There is evidence that that was done in this case; that the defendant stood at the fence and deliberately fired a pistol at or in the direction of the complainant, who was about sixty feet away, the ball just missing him, as before stated. But the defendant says he did not intend to hit him, but only to scare him. Assuming this to be true, as we must do in order to sustain the refusal to charge as requested, did it constitute an assault with a dangerous weapon under the statute? We think it did. The act of firing the pistol at the complainant, or in the direction where he was standing, with the intent to frighten him, was not only wholly inexcusable, but unlawful and reckless as well. It was an act which was well calculated to inflict serious personal injury; and from such an act the law implies malice. That it was an assault the defendant's counsel did not deny; but he contends it was not an assault with a dangerous weapon. Let us see. There was an assault—this is admitted. It was made with a loaded pistol. A loaded pistol is a dangerous weapon. Without the use of the pistol there would have been no assault. It logically as well as necessarily follows, therefore, that the offense committed was that of an assault with a dangerous weapon. The statute under which the indictment was found (Rhode Island Gen. Laws, cap. 277, sec. 19), reads thus: "Every person who shall make an assault or battery, or both, with a dangerous weapon, shall be imprisoned not exceeding two years." It will thus be seen that it is not necessary, in order to constitute the offense, that any bodily hurt should be inflicted—that is, that any battery should follow—but only that the assault should be made with a dangerous weapon.

Amongst the cases which hold that it is an assault to point a loaded weapon at a person, or to recklessly fire a pistol in the direction of another, see *Morgan v. State*, 83 Ala. 414; *United States v. Kierman*, 3 Cranch C. C. 435; *State v. Shepard*, 10 Iowa, 130; *Crow v. State*, 41 Tex. 471, 472; *Meador v. Stone*, 7 Met. 151.

We think there is sufficient evidence to sustain the verdict. The other grounds upon which a new trial was claimed not having been urged at the bar, there is no occasion for us to consider them.

Petition for a new trial denied, and case remitted to the common pleas division for sentence.

ASSAULT, WHAT IS NOT.—The firing of a revolver in close proximity to a person, without pointing it at him or intending to harm him, but with an intention of frightening him, is not an assault: *Degenhardt v. Heller*, 93 Wis. 662, 57 Am. St. Rep. 945; neither is the pointing at another of an unloaded pistol or a pistol not shown to have been loaded and threatening to use it upon him: *Klein v. State*, 9 Ind. App. 365, 53 Am. St. Rep. 354. Compare *State v. Herron*, 12 Mont. 230, 33 Am. St. Rep. 576.

FIRST NATIONAL BANK OF SHREVEPORT v. RANDALL.

[20 Rhode Island, 319.]

CREDITORS' BILLS TO SET ASIDE fraudulent conveyances and bills to reach equitable assets rest upon distinct grounds of jurisdiction, as the former invokes the aid of the court for relief from fraud, and the latter for the appropriation of assets which cannot be reached by law. Both kinds of bills are, however, proceedings in equity, and subject to the same general rules.

EQUITY JURISDICTION.—The office of equity is to supplement, not to supplant, the law, and when the remedy at law is adequate, equity will not interfere.

CREDITORS' BILLS TO REACH EQUITABLE ASSETS CANNOT STAND until legal remedies have been exhausted, and the complainants' rights as creditors have been established in the jurisdiction where the equitable remedy is sought.

FRAUDULENT CONVEYANCES—ATTACK AT LAW.—If a transfer of property is fraudulent and void as to a creditor, the debtor retains his interest in the property, as to such creditor, notwithstanding the conveyance, and the latter may attack it in an action at law.

JUDGMENTS—SISTER STATE—CONCLUSIVENESS OF PRESENT DEBT.—A judgment recovered in another state is not conclusive of the existence of a present debt, because of the defenses which may be urged against it.

FRAUDULENT CONVEYANCES—PLEADING.—Allegations that a conveyance is without consideration and for the purpose of hindering and delaying creditors are not conclusive even on demurrer, because such conveyance is not void if the debtor has other property sufficient to satisfy his debts. The best and most conclusive evidence that the debtor has no other property is the return of an execution unsatisfied.

FRAUDULENT CONVEYANCES—SETTING ASIDE.—After a creditor has secured a lien by attachment upon property of his debtor fraudulently conveyed, and has recovered a judgment against the grantor, upon which execution is to issue, a court of equity has independent and auxiliary jurisdiction to set aside the conveyance in order to clear away a cloud upon the title, so that the interest of the debtor may be sold to better advantage for both his and his creditor's benefit.

FRAUDULENT CONVEYANCE—BILL TO SET ASIDE—PLEADING.—If a grantee in voluntary conveyance is a party to a

bill to set it aside as fraudulent against creditors, it is not necessary to allege that he actually participated in, or was privy to, the grantor's fraudulent purpose.

S. O. Edwards, W. F. Angell, and S. Edwards, for the plaintiff.

H. A. McKinney, for the defendants.

²²⁰ STINESS, J. The complainant, having obtained a judgment in Louisiana against Charles J. Randall, brings this bill as a creditor to set aside a conveyance of realty in this state made by said Randall, which is alleged to be a fraudulent conveyance.

The bill is demurred to upon the grounds: 1. That there is no allegation that the complainant has judgment in this state; 2. That there is no allegation that execution has been issued and remedy at law exhausted; 3. That there is no allegation that at the time of the conveyance said Randall had no other estate subject to execution; 4. That it is not alleged that the other respondents had knowledge of the judgment or had a fraudulent intent.

The allegations of the bill applicable to these objections are that the judgment has not been satisfied; that the conveyance was without consideration and for the purpose of preventing the complainant from pursuing said property for the purpose of collecting its claim; that Charles J. Randall is not a resident of this state and is not to be found herein, and that he has no property in this state which it can attach and thereby secure service of process, and that the complainant has exhausted all the remedies at law within its power against said Randall.

Creditors' bills to set aside fraudulent conveyances and bills to reach equitable assets are frequently treated as though they were the same thing. In some respects they are alike, but the grounds of jurisdiction upon which they rest are quite distinct, the former invoking the aid of the court for relief from fraud, and the latter for the appropriation of assets which cannot be reached at law. Both are proceedings in equity, and so are subject to the same general rules. ²²¹ The office of equity is to supplement and not to supplant the law. Hence, when the remedy at law is adequate, equity does not need to interpose.

The rule, therefore, that a bill to reach equitable assets cannot stand until legal remedies have been exhausted, and the complainant's right as a creditor has been established in the

jurisdiction where the equitable remedy is sought, is applied to both proceedings, because it is based upon the principles that the aid of equity should not be invoked when there is an adequate remedy at law, and that the court of law is the proper forum to establish a right of recovery. Of course, there must be exceptions in cases where the requirements of the rule cannot be complied with, and one is to be found in *Merchants' Nat. Bank v. Paine*, 13 R. I. 592. That was the case of a foreign and absconding debtor, who had real and personal estate here which had been given to trustees for the benefit of himself and others by the will of his father. The complainant claims that the decision supports this case. But the radical difference between the two cases is that in the former the assets were purely equitable, and hence no service of process could be made either upon the debtor himself or by attachment of his property in an action at law. In a case like the present one, where it is alleged that the transfer of property was fraudulent and void as to a creditor, it is held that, as to such creditor, the debtor retains his interest in the property, notwithstanding the conveyance, and it can, therefore, be attached in an action at law: *McKenna v. Crowley*, 16 R. I. 364.

The fact that the complainant has a judgment against the debtor in another state is not conclusive of the existence of a present debt, because there may be defenses such as payment, lack of proper service, setoff, and the like. Nor are the allegations conclusive that the conveyance was without consideration and for the purpose of hindering and defrauding creditors, even on demurrer; because such a conveyance is not void if the debtor has other property sufficient to satisfy his debts, and from which the complaining creditor can get his pay; and we regard the rule as settled in this state that ³²² the best and conclusive evidence that the debtor has no other property is the return of an execution unsatisfied: *Merchants' Nat. Bank v. Paine*, 13 R. I. 592; *Ginn v. Brown*, 14 R. I. 524; *Stone v. Westcott*, 18 R. I. 517. While, therefore, the legal remedy is open, and neither the debt nor the fraud in conveyance is conclusively established, the grounds for jurisdiction in equity do not appear.

The strict application of the rule above stated has been so far relaxed in *McKenna v. Crowley*, 16 R. I. 364, as to hold that after a creditor has secured a lien by attachment upon property fraudulently conveyed, and has recovered a judgment against the grantor, upon which execution is to issue, the court

in equity has the independent and auxiliary jurisdiction to set aside the conveyance in order to clear away a cloud upon the title, so that the interest of the debtor may be sold to better advantage for both his and his creditor's benefit. The jurisdiction is quite distinct from that of a creditor's bill to reach equitable assets, and hence the court remarked that "it is the levy of the execution giving a lien, and not its return unsatisfied, which is the prerequisite to it."

The line of decisions in this state which is thus outlined is consistent, and is in harmony with decisions elsewhere and with well-established principles, as shown by citations in previous opinions, so that it is not necessary to review authorities again in this case. From these decisions it appears that the complainant is not yet in a position to invoke the aid of a court of equity, and this disposes of the first three grounds of demurrer to the bill.

As to the fourth ground of demurrer, that it is not alleged that the other respondents had knowledge of the judgment or had a fraudulent intent, it is disposed of by *McKenna v. Crowley*, 16 R. L. 364, where the court said: "It was not necessary that the grantee, the conveyance being voluntary, should actually participate with the grantor in his purpose, or be privy to it."

Demurrer to the bill sustained.

CREDITOR'S BILL.—A CREDITOR MUST FIRST EXHAUST his remedy at law before filing a bill in equity: See the monographic note to *Massey v. Gorton*, 90 Am. Dec. 288. For modifications of this rule, see the monographic note to *Ladd v. Judson*, 66 Am. St. Rep. 274, 275.

CREDITOR'S BILL.—FOREIGN JUDGMENTS as a basis for creditors' bills are considered in the monographic note to *Ladd v. Judson*, 66 Am. St. Rep. 278-280.

A FRAUDULENT TRANSFER IS VOID AGAINST all creditors of the debtor, and, as against the fraudulent transferee, a creditor may seize the property as that of the grantor: *First Nat. Bank v. Maxwell*, 123 Cal. 360, 69 Am. St. Rep. 64. Creditor's suits to reach property fraudulently conveyed are discussed in the extended notes to *Ladd v. Judson*, 66 Am. St. Rep. 286, 287; *Massey v. Gorton*, 90 Am. Dec. 293-295.

STATE v. WATSON.

[20 Rhode Island, 354.]

MARRIAGE AND DIVORCE—VACATING DIVORCE—ADULTERY.—After a decree of divorce has been set aside the prior marriage is in full force, and the husband, by thereafter having carnal knowledge of the body of his second wife, commits adultery.

JUDGMENTS.—COURTS HAVE INHERENT POWER TO AMEND OR SET ASIDE their judgments for cause.

JUDGMENTS—FRAUD IN OBTAINING—VACATION—DIVORCE.—Fraud of the party in whose favor a judgment is rendered and the innocence of the other party thereto are sufficient grounds for vacating the judgment. Divorce decrees are subject to this rule.

JUDGMENTS—DIVORCE DECREES—SETTING ASIDE FOR FRAUD.—Fraud of one of the parties in obtaining a decree of divorce is good ground for setting it aside.

CRIMINAL PLEADING REQUIRES THAT A PLEA to the jurisdiction shall precede the plea of not guilty. If the special plea is determined against the defendant, he may then be allowed to plead over.

CRIMINAL PLEADING.—AFTER PLEA OF NOT GUILTY, the defendant cannot file any other plea without leave of court.

CRIMINAL PLEADING.—PLEA OF AUTREFOIS CONVICT must allege that the two offenses are the same, and if the offenses charged in the two indictments are distinct, though committed concurrently, they may be separately prosecuted.

CRIMINAL LAW.—MOTIONS TO QUASH INDICTMENTS or other criminal process are addressed alone to the discretion of the trial court, and can be granted only for defects apparent on the record. Matters dehors the record must be set up by plea.

W. B. Tanner, attorney general, and C. F. Stearns, assistant attorney general, for the plaintiff.

J. E. Dennison and G. R. McKenna, for the defendant.

354 TILLINGHAST, J. The defendant, who has been convicted of the crime of adultery with one Mary A. Watson, now petitions for a new trial on numerous grounds, the substance of which, so far as we are able to understand them from the confused statement thereof, is that the verdict is against the evidence and that the court erred in certain rulings which will be hereinafter mentioned.

The uncontradicted testimony offered by the state shows that the defendant lived with the said Mary A. Watson as his wife for nearly six years, during two of which he lived with her in Hopkinton in this state, and that he had three children by her. While the defendant does not attempt to deny that he lived with said Mary as his wife, yet he contends and sets up

as a defense to the indictment that such ³⁵⁵ cohabitation was not adulterous because, as he alleges, he had obtained a divorce from his former wife, and that he was lawfully married to said Mary at that time; and the vital question, therefore, is as to the validity of said divorce.

The facts are these: In 1870 the defendant was lawfully married to Melinda Buddington in the state of Connecticut. On the twenty-first day of May, 1889, the superior court of Windham county, Connecticut, upon a petition filed by him, granted a decree divorcing him from his said wife. On the twenty-third day of May, 1889, two days after the said decree was granted, the defendant married said Mary A. Watson, in Stirling, Connecticut, and subsequently lived with her as his wife as aforesaid. Shortly after said divorce was granted the respondent therein filed a petition in said superior court, asking that said decree be set aside and the case re-entered upon the docket, which motion, after notice and hearing, was, on the eighteenth day of June, 1889, granted, the court finding that the respondent therein was prejudiced by the decree; that she had a good defense to the action, and was prevented by mistake and accident from appearing to oppose the same. The court also found that said respondent had employed counsel to oppose the granting of the petition for divorce, and that her counsel had actually appeared to defend the suit but had not entered his appearance upon the docket, and also that the petitioner knew that the respondent had so appeared.

In view of these facts the court, Douglas, J., charged the jury in the case at bar that said Melinda Watson continued to be the wife of this defendant from the time of said first-mentioned marriage in 1870, except at most during the interval from the 21st of May, 1889, to the 19th of June, 1889, and that what the relations of the parties were under the law of Connecticut during the term at which the decree of divorce was entered it was not necessary for the jury to consider, as it did not affect the case.

The defendant's counsel requested the court to charge as follows: "1. That a man who in good faith marries a woman, when he was divorced from his former wife, and the divorce ³⁵⁶ was believed by both of them (parties to the second marriage) to be valid and conclusive, he cannot be convicted of adultery with her (second wife) if neither he nor she were married persons, but single, at the time of their marriage to each other, unless they had been divorced from each other since

their marriage and before the alleged adultery; 2. After a divorce from a former wife a man does not, by cohabiting as man and wife under his second marriage or by having carnal knowledge of the body of his second wife, commit the crime of adultery. But the indictment should allege the second marriage, and all the other facts constituting bigamous cohabitation if the second marriage took place in another state; and if the jury find these facts to be true, there is a variance between the evidence and the pleadings, and verdict should be 'not guilty.'"

In reply to these requests the court said: "I understand the first request to apply in this way: That if, during the time that the decree of divorce was in force—that is to say, from May 21, 1889, to the 18th of June, 1889—that on the 23d of May, when the ceremony of marriage was gone through, these parties were not living in adultery. I will charge you for the purposes of this case that that is so. But you see that is not the time that this indictment charges them with having committed adultery. The second is that after the divorce from the former wife the man does not, by cohabiting as man and wife under his second marriage, or by having carnal knowledge of the body of his second wife, commit the crime of adultery. That I refuse."

We do not see that the defendant has any ground to complain of this instruction. After the decree of divorce was set aside in manner aforesaid, it is clear that the first-mentioned marriage was in full force; and, therefore, the defendant was a married man and had a wife living at the time of the commission of the alleged crime of adultery, if, indeed, such was not the case at the date of his second marriage.

It is evident from an inspection of the record of the divorce ⁸⁵⁷ proceedings that the Connecticut court was imposed upon and deceived by the defendant in connection with the granting of said decree; in short, that the decree was obtained by fraud. And upon this fact being shown by the respondent in that case said court promptly righted the wrong thus perpetrated and placed the parties to the suit where they were before.

That, as a general proposition, courts have power to set aside, vacate, modify, or amend their judgments for good cause no one will question, such power being inherent in the court as a part of its necessary machinery for the due administration of justice. And whenever a judgment is obtained by the fraud of the party in whose favor it is rendered, and the other party

is not implicated therein, of course this constitutes a good and sufficient cause for vacating the judgment. Decrees in divorce suits are not exempted from the operation of this rule, although courts are more reluctant to disturb a decree of divorce, especially after a second marriage involving the interest of third persons. A full discussion of the general question involved may be found in the cases cited in 2 Bishop on Marriage, Divorce, and Separation, sec. 1552, note 3; also 1 Black on Judgments, sec. 320.

In *Bradstreet v. Neptune Ins. Co.*, 3 Sum. 604, Story, J., says: "I know of no case where fraud, if established by competent proofs, is not sufficient to overthrow any judgment or decree, however solemn may be its form of promulgation."

In *Adams v. Adams*, 51 N. H. 388, 12 Am. Rep. 134, which is a leading case upon the subject under consideration, Bellows, C. J., says: "This doctrine, in regard to impeaching judgments and decrees for fraud, has been applied in numerous cases to decrees in divorce suits and suits for nullity of marriage, and the weight of authority is greatly in favor of such application. Upon principle, there is no solid ground for any distinction between decrees in divorce suits and other judgments; or, if there be any, it is to be found in the much greater danger of fraud and imposition in divorce cases, as compared with others, thus adding largely to the necessity and importance of preserving the power to correct or vacate ³⁵⁸ decrees that have been obtained by fraud and imposition. Accordingly, it is laid down in Bishop on Marriage, Divorce, and Separation, section 699, that if a tribunal has been imposed upon, and in consequence of the fraud a judgment of divorce has been wrongfully rendered, it may vacate this judgment when, upon a summary proceeding, it is made cognizant of the fraud." To the same effect are *Edson v. Edson*, 108 Mass. 590, 11 Am. Rep. 393; *Bomsta v. Johnson*, 38 Minn. 230; *Wisdom v. Wisdom*, 24 Neb. 551, 8 Am. St. Rep. 215.

It is clear, then, that whatever the status of the defendant was between the time of the granting of said decree of divorce and the annulment thereof, yet the said Matilda Watson was his lawful wife during the time covered by the indictment in this case.

The next error alleged to have been committed by the presiding justice is that he overruled the defendant's plea to the jurisdiction of the court. The record shows that on March 23, 1896, the defendant was arraigned and pleaded "not guilty,"

and that on May 19, 1896, without having asked or obtained permission to retract this plea, and without permission to file any further plea, he filed a plea to the jurisdiction, as he styles it (although in fact it is a plea of autrefois convict, which is a plea in bar), in which he sets up former jeopardy and former punishment for the same or a kindred offense. On June 8, 1896, the defendant also filed a motion to dismiss the indictment for want of jurisdiction, on the ground of former jeopardy. On June 10th he filed what he denominates a "motion to quash, in the nature of a substantial demurrer," on the ground that the indictment charges no offense known to the law, and for various other reasons not appearing of record. On the same day he made a motion for leave to withdraw his plea of "not guilty," which was denied by the court, whereupon the trial of the case proceeded and the jury found the defendant guilty.

First, then, as to said plea to the jurisdiction. This plea was filed too late. The rules of criminal pleading require that a plea to the jurisdiction, like a demurrer, plea in abatement, ³⁵⁹ plea in bar, or any other special plea whatever, shall precede the plea of not guilty. If the special plea is determined against the defendant, the practice is to then allow him to plead over: *State v. Edgerton*, 12 R. I. 108. Moreover, after a plea of not guilty the defendant cannot file any other plea without leave of court: *Commonwealth v. Blake*, 12 Allen, 188; *Commonwealth v. Lannan*, 13 Allen, 563. We have, however, examined said plea to the jurisdiction, but do not find that it would have been of any avail if it had been filed in season. It sets out, or attempts to set out, a former conviction of the defendant for bigamous cohabitation with the said Mary A. Watson, the indictment in which case covers and includes the same time on which the offense is laid in the one before us. It also sets out that the defendant was imprisoned for six months and ten days for said offense, and he refers to the record of said case in support of his allegation. As that case was before this division on habeas corpus, we can properly take notice of the facts therein, and they are these: The defendant was convicted of bigamous cohabitation with said Mary A. Watson, as alleged in the plea, and was sentenced therefor to imprisonment for the term of four years. Some time after he was committed he obtained a writ of habeas corpus on the ground that the indictment stated no offense known to the law, and after hearing thereof this court decided that the indictment was

fatally defective and ordered the defendant discharged from imprisonment: See *Watson, Petitioner*, 19 R. I. 342. It will at once be seen, therefore, that said plea to the jurisdiction, so-called, is without any force or validity. The indictment on which he was tried, convicted, and sentenced was not only for another and distinct offense from that with which he is charged in the indictment now before us, but by reason of being fatally defective in the manner aforesaid was a mere nullity. "Where there is no jurisdiction," as said by Mr. Wharton in his work on Criminal Pleading and Practice, ninth edition, section 507, "or where the indictment is defective even in a capital case, it is agreed on all sides the defendant has never been in jeopardy, and consequently, if judgment be arrested, a new indictment can ³⁸⁰ be preferred and a new trial instituted without violation of the constitutional limitation. Even partial endurance of punishment under a defective indictment will be no bar when the proceedings are reversed on the defendant's motion; although it is otherwise when the judgment is unreversed. But a judgment erroneously arrested on a good indictment may be a bar": See, also, *Kohlheimer v. State*, 39 Miss. 548, 77 Am. Dec. 689, cited by counsel for defendant. Moreover, a plea of *autrefois convict* must allege that the two offenses are the same; for when the offenses charged in the two indictments are distinct, though committed concurrently, they are separably prosecutable. Thus, the fact that a person has been convicted of keeping a drinking-house and tippling-shop is no bar to an indictment for presuming to be a common seller, although both indictments cover the same period of time and are supported by the same acts of illegal sale: *State v. Inness*, 53 Me. 536. Blackstone says that the pleas of former acquittal or former conviction must be upon a prosecution for the identical act and crime: 4 Blackstone's Commentaries, 336. And Chief Justice Shaw says that, in considering the identity of the offense, it must appear by the plea that the offenses charged in both cases are the same in law as well as in fact; and that the plea will be vicious if the offense charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact: *Commonwealth v. Roby*, 12 Pick. 496; *Rice's Criminal Evidence*, sec. 385, and cases cited; *Commonwealth v. Putnam*, 1 Pick. 136, 140.

As to the defendant's motion to dismiss, it is sufficient to say that it is based upon the same ground as the plea which we

have just passed upon, and hence requires no further consideration.

The defendant's "motion to quash, in the nature of a substantial demurrer," was properly overruled. A motion to quash an indictment or other criminal process is addressed to the discretion of the trial court, and, as said by Ames, C. J., in *State v. McCarty*, 4 R. I. 84, "is never granted unless by this short dealing the ends of justice can be as well attained, and the rights and equities of the parties as well ³⁶¹ observed as by allowing the cause to go on to its termination in the accustomed mode": See, also, *Chitty's Criminal Law*, 300-303. We have, however, examined the indictment in the case at bar, and find that it is in the ordinary form, and clearly and technically sets out and charges the crime of adultery.

As to that part of the motion which sets up matters dehors the record, we reply that, in the first place, it sets out no ground of defense, and, in the second place, even if it did, the matter should have been set up by plea and not by motion to quash, as the latter can be granted only for defects apparent on the record: *Howland v. School Dist.*, 15 R. I. 184. See, also, *State v. Drury*, 13 R. I. 540; *State v. Maloney*, 12 R. I. 251; *Wharton's Criminal Pleading and Practice*, secs. 386-388.

The only remaining motion to be considered in this case is that in arrest of judgment, which is merely a rehash of the defendant's plea to the jurisdiction, so-called, and of his subsequent motions which we have already considered. The motion is coupled with an argument to the effect that the defendant, if indictable at all, should have been indicted for some other offense than that of adultery, and also that one of the guilty parties cannot be indicted without the other. It would not seem to require a very thorough knowledge of criminal pleading in order for counsel to avoid mistakes of this sort, as well as those hereinbefore pointed out. The motion in arrest of judgment is overruled.

We have examined the numerous other grounds contained in the defendant's petition for a new trial, but do not find that they are entitled to any serious consideration.

Petition denied and case remitted to the common pleas division for sentence.

ADULTERY.—A DIVORCED MAN does not commit adultery by marrying and cohabiting with another woman, though the divorce was procured by his wife and he has obtained no divorce: *State v. Weatherby*, 43 Me. 258, 69 Am. Dec. 59. And a man cannot be con-

victed of adultery who in good faith marries a woman whose husband has remained absent for more than seven years without being heard from and is believed by both parties to be dead, although in fact he is still living: *Commonwealth v. Thompson*, 6 Allen, 591, 83 Am. Dec. 653. Compare *Commonwealth v. Thompson*, 11 Allen, 23, 87 Am. Dec. 685; and see *State v. Outshall*, 109 N. C. 764, 26 Am. St. Rep. 599.

DIVORCE—VACATING DECREE OF.—A decree of divorce obtained by a husband through fraud upon the wife will be set aside: Note to *Brown v. Grove*, 9 Am. St. Rep. 826; although a marriage has been contracted on its faith and issue born: *Allen v. Maclellan*, 12 Pa. St. 828, 51 Am. Dec. 608. See, further, the monographic note to *Greene v. Greene*, 61 Am. Dec. 459-468; *Simpkins v. Simpkins*, 14 Mont. 386, 43 Am. St. Rep. 641.

PARKER v. PROVIDENCE CARRIAGE COMPANY.

[20 Rhode Island, 378.]

NEW TRIAL—MISCONDUCT OF COUNSEL.—A groundless and wholly unjustifiable attack by counsel upon a party to a cause on trial before a jury is calculated to prejudice their minds and prevent them from impartially weighing the evidence, and is ground for a new trial.

T. P. Owen, for the plaintiff.

E. D. Bassett, E. L. Mitchell, and A. P. Sumner, for the defendant.

379 PER CURIAM. The issue in this case was whether Deslauriers was a member of the defendant firm. The jury returned a verdict for the plaintiff, thereby finding that he was. We are inclined to think that a preponderance of the evidence is against the finding. The record shows that the plaintiff's attorney, while examining one of his witnesses, counsel for Deslauriers having objected to a question put to the witness, stated in the presence of the court and jury, "I expect at some stage of the game to show, by the testimony of witnesses who are perfectly disinterested and know about these transactions, that it is an old trick of Deslauriers to do such work, to get up a company, get goods for twenty per cent of what they are worth, and then swipe the whole business, and steal the books, etc." Such an attack on a party to the cause, which, so far as the case shows, was perfectly groundless, was wholly unjustifiable and should have received, as it did, the immediate censure of the court. It was calculated to prejudice the minds of the jury

against Deslauriers, and to prevent them from weighing the evidence with that discrimination and impartiality to which he was entitled. It may have caused the finding against him. We are of the opinion, therefore, that a new trial should be granted.

New trial granted, and case remitted to the common pleas division.

NEW TRIAL.—LANGUAGE OF COUNSEL, calculated to humiliate and degrade the defendant in the eyes of the jury and bystanders cannot be permitted, and if it is not checked or is persisted in after warning from the court, it is ground for granting a new trial: Monographic note to McDonald v. People, 9 Am. St. Rep. 568. See, too, Haupt v. State, 108 Ga. 53, 75 Am. St. Rep. 19; Kearney v. State, 101 Ga. 803, 65 Am. St. Rep. 344.

MORGRIDGE v. PROVIDENCE TELEPHONE CO.

[20 Rhode Island, 386.]

MASTER AND SERVANT—FELLOW-SERVANTS—HOW DETERMINED.—The character of the act, and not the rank of the person performing it, furnishes the test by which to determine whether in the performance thereof the person acting is the representative of the master or a fellow-servant.

MASTER AND SERVANT—FELLOW-SERVANTS—SUPERINTENDENT AND WORKMAN.—A superintendent of a telephone company in directing workmen to let go their hold on a telephone pole which they are raising is a fellow-servant with them, when the order might as well have been given by any other employé as by such superintendent. In giving such order the superintendent does not perform any act on behalf of the company which legally devolves upon it to perform.

D. R. Ballou and C. S. Tower, for the plaintiff.

D. S. Baker and W. B. Vincent, for the defendant.

386 TILLINGHAST, J. We think the demurrer should be sustained. The plaintiff, while assisting in the moving of a large telephone pole, was injured by reason of the falling thereof upon his body. The declaration shows that the superintendent in charge of the work had directed the plaintiff and several other fellow-servants of his to raise the top end of the pole, in order that a carriage on two wheels, called a "dinkey," could be placed under said pole for the purpose of moving it to the hole where it was to be erected. After the pole had

been raised, said "dinkey" was wheeled under the same, by direction of the superintendent, but before it had reached the ²⁸⁷ place where it was intended it should receive said pole—that is, before it came in contact with the pole so as to support the same—the superintendent gave the order to "let go," whereupon the plaintiff, supposing that the "dinkey" was so placed as to instantly receive the weight of said pole, he not being in a position where he could see the "dinkey," obeyed the order, and, by reason of the fact that the pole was some distance above the "dinkey" when said order was given, it fell, striking the plaintiff and seriously injuring him. In support of the declaration it is contended that the act of the superintendent, in ordering the plaintiff and his fellow-servants to let go their hold on the pole, was in law the act of the defendant corporation and, being a negligent act, gives the plaintiff a right of action. This contention is not tenable. In directing the plaintiff and his fellow-servants to let go their hold on the pole the superintendent was not performing, on behalf of the defendant corporation, any duty imposed by law upon it, that is, it was not an act which legally devolved upon the defendant to perform. The order to let go might as well have been given by any other employé as by the superintendent. It was a mere incident in connection with the raising of the pole. And as it is the character of the act, and not the rank of the person performing it, which is the test by which to determine whether in the performance thereof the person acting is the representative of the master (*Hanna v. Granger*, 18 R. I. 507, 512; *Larich v. Moies*, 18 R. I. 513; *Moody v. Hamilton Mfg. Co.*, 159 Mass. 70, 38 Am. St. Rep. 396), it is clear that in the giving of said order the superintendent was acting as a fellow-servant.

The recent case of *Donnelly v. San Francisco Bridge Co.*, 117 Cal. 417, is singularly pertinent. There the plaintiff was injured while engaged in the work of pile-driving. A pile had been driven too deep, and the plaintiff, with other men, was sent by the superintendent to lay a foundation for a jack-screw to raise the pile. This required the plaintiff to work under the pile-driver. He was engaged in carrying and arranging blocks upon which to place the jack. The blocks were supplied from a place ten or twelve feet above, from which height ²⁸⁸ they were thrown down to the workmen below, the superintendent directing the work. While the plaintiff was stooping down to pick up a block he was struck by one thrown from

above. The man above inquired before he threw the block if all was clear below, and was answered in the affirmative by the superintendent and others, and the block was thrown. The superintendent, when he gave his answer, was standing within a few feet of the plaintiff, and there was nothing to obstruct his view of him. It appeared that the superintendent noticed the plaintiff the instant after he had given the order, and called to the workman to hold, but it was too late, as the block was already falling. The court held that the injury resulted from the negligent performance of an act which it was no part of the duty of the defendant to perform, and hence that as to that act the superintendent was not the representative of the master, and reversed the judgment of the court below, which was in favor of the plaintiff.

We think that it is clear, both from our own decisions and from the weight of authority generally, that the declaration does not state any cause of action.

Demurrer sustained, and case remitted to the common pleas division with direction to enter judgment for the defendant for costs.

FELLOW-SERVANTS.—WHO ARE fellow-servants is discussed in the note to *Fisk v. Central Pac. R. R. Co.*, 1 Am. St. Rep. 82, 33; *Fox v. Sandford*, 67 Am. Dec. 583-597; *Lawler v. Androscoggin R. R. Co.*, 16 Am. Rep. 495-502. The character of the act, in the performance of which an injury results to a coemployé, determines whether the offending servant is a representative of the master; his place or grade of service is immaterial: See the monographic note to *Mast v. Kern*, 75 Am. St. Rep. 587-589.

ANGELL v. LEWIS.

[20 Rhode Island, 391.]

LAW OF ROAD.—The driver of a team taking the left-hand side of the highway assumes the risk of consequences which may arise from his inability to get out of the way of another team approaching on the right side of the road, and is responsible for injury sustained by the latter while exercising ordinary care.

LAW OF ROAD.—One who violates the law of the road by driving on the left side assumes the risk of such experiment, and is required to use greater care than if he had kept to the right, and if, under such circumstances, a collision takes place, the presumption is against the person on the left side of the road, especially if the accident occurs in the dark.

LAW OF ROAD.—The driver of a team has the right to presume that the driver of a team coming in an opposite direction

will observe the law of the road and keep to the right, as he himself is doing.

LAW OF ROAD.—If the driver of a team observing the law of the road discovers a team approaching in an opposite direction in time to prevent a collision, by stopping or otherwise, it is his duty to do so, although the driver of the other team is guilty of negligence in violating the law of the road.

A. J. Cushing, for the plaintiff.

S. A. Cooke and L. A. Angell, for the defendant.

³⁹² **TILLINGHAST, J.** The evidence shows that on January 3, 1897, between 5 and 6 o'clock P. M., the plaintiff's wife, together with her hired girl, while driving from her home at Fruit Hill toward Centredale, in North Providence, in the plaintiff's team, which consisted of a horse and top-buggy, met with an accident in the following manner: The plaintiff's wife, while driving along on the right-hand side of the road, saw two teams coming toward her from the opposite direction, and seasonably turned out still further toward the right to allow them to pass. As she was passing them the defendant, who was in his team—a two-wheeled village cart—immediately in the rear of said teams and coming in the same direction, instead of keeping behind them, suddenly turned out to his left, and, in attempting to pass said teams, ran into the plaintiff's team, and caused the damage to recover which this suit is brought. It was dark and foggy at the time of the accident, and a team could not be seen at any considerable distance. The defendant admits that there were two teams ahead of him; that he turned out to his left to go by them, and that as he turned out he met and collided with the plaintiff's team, which he did not see until he started to go by the others, when it was too late to avoid the collision. He also admits that when he pulled out to pass the teams ahead of him he was not thinking that some one might be coming toward him on the other side of the road. The road where the accident happened was practically level and was thirty-seven and one-half feet in width, twenty-five feet of which, at least, could be safely used for carriages. The teams in front of defendant were traveling, according to the testimony of the persons driving the same, at the rate of eight or nine miles per hour ³⁹³ when defendant attempted to pass them; and the evidence is pretty clear that defendant was driving at a rapid pace when he attempted to pass the other teams.

These being the material facts in the case, the verdict of the jury, which was for the defendant, was clearly against the evidence and ought to be set aside.

General Laws of Rhode Island, caption 74, section 1, provides that: "Every person traveling with any carriage or other vehicle, who shall meet any other person so traveling on any highway or bridge, shall seasonably drive his carriage or vehicle to the right of the center of the traveled part of the road, so as to enable such person to pass with his carriage or vehicle without interference or interruption."

The evidence shows that the plaintiff's wife complied with this requirement on meeting the two teams aforesaid, and that she was in the act of passing them safely, when the defendant suddenly pulled his team to the left and collided with hers. In thus taking the wrong side of the road, the defendant took the risk of the consequences which might arise from his inability to get out of the way of another team approaching on the right side of the road, and is responsible for injuries sustained by the latter while exercising ordinary care. In other words, one who violates the "law of the road" by driving on the wrong side assumes the risk of such an experiment, and is required to use greater care than if he had kept on the right side of the road; and, if a collision takes place in such circumstances, the presumption is against the party who is on the wrong side. And this is especially true where the collision takes place in the dark: *Cruden v. Fentham*, 2 Esp. 685; *Shearman and Redfield on Negligence*, 4th ed., sec. 651; *Elliott on Roads and Streets*, 620, and cases cited in notes 5-7; *Chaplin v. Hawes*, 3 Car. & P. 554. In *Brooks v. Hart*, 14 N. H. 307 (311), the court says: "It is legal negligence in anyone to occupy the half of the way appropriated by law to others having occasion to use it in traveling with teams and carriages, and he is chargeable for any injury flowing exclusively from that cause." To the same effect are *Wilson v. Rockland Mfg. Co.*, 2 Harr. (Del.) 67 (70), and ³⁹⁴ *Fales v. Dearborn*, 1 Pick. 345: See, also, 12 Am. & Eng. Ency. of Law, 957-960, and cases; *Kennard v. Burton*, 25 Me. 39, 43 Am. Dec. 249. The plaintiff's wife had the right to presume that the driver of any team coming in the opposite direction would duly observe the law of the road as she herself was doing: *Wood v. Luscomb*, 23 Wis. 287 (291); and hence she was not called upon to exercise that degree of care which devolved upon the defendant when taking the wrong side of the road: *Pluckwell v. Wilson*, 5 Car. & P. 375. Of course, if

plaintiff's wife had discovered the defendant's team in time to have avoided the collision, by stopping or otherwise, it would have been her duty to do so, notwithstanding the fact that defendant was guilty of negligence in violating the law of the road: *O'Malley v. Dorn*, 7 Wis. 236, 73 Am. Dec. 403; *Cooley on Torts*, 66, 67. But it is very clear from the testimony that she did not see defendant's team until it was too late to avoid the collision, and hence that she was not in fault regarding the accident.

Petition for a new trial granted, the same to be had on the question of damages only.

LAW OF THE ROAD.—A person using a highway has a right to assume that a fellow-traveler will exercise ordinary care, and to govern his own conduct accordingly: See the monographic note to *Riepe v. Elting*, 48 Am. St. Rep. 372.

A PERSON DRIVING ON THE WRONG SIDE of the road must use more care and keep a better lookout to avoid collision than would be required if he were on the proper part of the road, and his being there is prima facie evidence of negligence: See the monographic note to *Riepe v. Elting*, 48 Am. St. Rep. 374-376.

LAW OF THE ROAD.—FAILURE TO TURN TO THE RIGHT does not render a traveler liable for a collision if the one with whom he collides could have avoided it by the exercise of ordinary care: See the monographic note to *Riepe v. Elting*, 48 Am. St. Rep. 369-371.

O'KEEFE v. ALLEN.

[20 Rhode Island, 414.]

ASSIGNMENT.—WAGES TO BE EARNED UNDER A SUBSISTING CONTRACT may be assigned as against a subsequent garnishment, but the assignment becomes inoperative when the contract of employment on which it rests ceases. Such assignment is not revived by a subsequent return to the employment under a new contract.

F. F. Farrell, for the plaintiff.

J. M. Gilrain, for the defendant.

415 **MATTESON, C. J.** This is assumpsit on book account. The action was brought in the district court for the sixth judicial district. Attachments by trustee process were made of the defendant's wages in the possession of the Miller Iron Works, by which he was employed. The answer of the garnishee disclosed that on June 24, 1895, the defendant, by his

deed of that date, assigned to James Cunningham all moneys which should become due to him from the garnishee for services as a molder between that date and June 24, 1896; that at the date of the assignment he was in the employment of the garnishee and had been so employed for a number of years, but that he left the garnishee's employment in October, 1895, and entered their employment again in the month of December following. On these facts the plaintiff moved that the garnishee be charged. The court denied the motion, and the plaintiff excepted.

We think that the district court erred in its rulings. It is well established that wages to be earned under a subsisting contract may be assigned, and that an assignment in good faith is valid against a subsequent garnishment: *Tierney v. McGarity*, 14 R. I. 231. The moment, however, that the defendant left the employment of the Miller Iron Company, in October, 1895, the contract of employment, on which the assignment of wages of June 24, 1895, rested, was at an end. His subsequent return to the employment was not by virtue of the old, but under a new, hiring. As to this new contract the assignment at law, however it might be in equity, was the assignment of a mere possibility, and therefore, at law, inoperative: *Tierney v. McGarity*, 14 R. I. 232; *Edwards v. Peterson*, 80 Me. 367, 6 Am. St. Rep. 207. The case which comes nearest to sustaining an opposite doctrine of any which we have found⁴¹⁶ is *Wallace v. Walter Hayward Chair Co.*, 16 Gray, 209. In this case it was held that a written order for the payment of a certain sum out of his wages, drawn for a sufficient consideration by a workman employed under a subsisting engagement for a certain time, upon his employer, and accepted by the latter, and made "payable when earned," applied to wages earned under a new engagement entered into by the workman immediately on the expiration of the first, for lower wages, with the same employer. The court admitted the rule stated above, but seemed to think that the fact that the new arrangement immediately followed the old, so that the service was continuous, was sufficient to prevent the operation of the rule. It evidently regarded the new arrangement rather as a modification of the old, and the old as still subsisting, than as a new and independent employment. The case at bar is in this respect totally unlike *Wallace v. Walter Hayward Chair Co.*, 16 Gray, 209; for here there was no continuity of service, and the return

to the employment was, so far as appears, under a new and distinct hiring.

The answer of the garnishee also discloses that, before the service of the writ of mesne process, the defendant, on June 24, 1896, had executed a second assignment of his wages to Cunningham, which was operative, under the new hiring in the preceding December, as against the service by trustee process on that writ on July 3, 1896.

Exception sustained, and case remitted to the district court for the sixth judicial district, with direction to charge the garnishee to the extent of the moneys in its possession at the time of the attachment on the original writ, to wit, June 20, 1895.

In *Dolan v. Hughes*, 20 R. I. 513, it appeared that a person was under employment without limitation as to time, and, being indebted to another, assigned his wages to him for the term of one year, but drew them himself on an order from the assignee, to whom the wages were immediately paid when drawn, and it was held that such transaction was valid and not fraudulent and void as against a subsequent attachment. "The presumption of law is in favor of the validity of the assignment and of the good faith of the transactions thereunder, and they must be proved to have been fraudulently made before the court can decide against them: *Johnson v. Thayer*, 17 Me. 403; *Adams v. Robinson*, 1 Pick. 461; *Drake on Attachment*, sec. 615; *Shinn on Attachment and Garnishment*, sec. 114."

The court also held that the fact that the contract of employment was silent as to the time of its duration did not affect the right of the employé to assign the wages arising under it. General Laws of Rhode Island, caption 254, section 28, recognize the validity of an assignment of future earnings when made and recorded in accordance therewith; and this court has repeatedly held such an assignment to be good: *Tierney v. McGarity*, 14 R. I. 231; *Kennedy v. Tiernay*, 14 R. I. 528; *Chace v. Duby*, 20 R. I. 463; whether the hiring is in fact by the day, week, month, year, or otherwise.

AN ASSIGNMENT OF FUTURE EARNINGS is valid as against a creditor seeking to subject them to trustee process: *Thayer v. Kelley*, 28 Vt. 19, 65 Am. Dec. 220; *Kane v. Clough*, 36 Mich. 434, 24 Am. Rep. 599. See, too, *Metcalf v. Kincaid*, 87 Iowa, 443, 48 Am. St. Rep. 891; *Millington v. Laurer*, 89 Iowa, 822, 48 Am. St. Rep. 385.

KELLEY v. SCHUYLER.

[20 Rhode Island, 432.]

PROCESS—UNLAWFUL SERVICE OF.—An officer who breaks and enters the outer doors of a dwelling-house for the purpose of serving an ordinary writ of replevin or other civil process becomes a trespasser, especially when no question of fraud or covin is involved.

J. Osfield, Jr., for the plaintiff.

C. J. Farnsworth and T. W. Robinson, for the defendant.

⁴³² **TILLINGHAST, J.** These are actions of trespass quare clausum fregit, for breaking and entering the plaintiff's dwelling-house and taking and carrying away certain articles of personal property of the plaintiff therefrom. The facts are substantially these: One Josephine Donnelley died at the plaintiff's house, leaving there certain articles of personal property. One Thomas O'Brien was appointed administrator on the estate of said Josephine, and he afterward sued out of the district court of the tenth judicial district a writ of replevin against the plaintiff in the present suits to obtain possession of said personal property, the plaintiff having refused ⁴³³ to deliver the same. The defendant George H. Schuyler, who was a constable, went to plaintiff's house to serve said writ, but was refused admittance. After obtaining advice from his attorney he went again, on the twelfth day of February, 1897, and being again refused admittance, he, with the assistance of the defendant Donnelley, broke and entered the house by prying open the outside door, which was locked. They also forced an inner door, which was fastened, and then proceeded to take and carry away, by virtue of the authority contained in the writ of replevin, certain goods and chattels which the defendant Donnelley pointed out to the officer as the property of said O'Brien, administrator. The evidence is conflicting as to whether the defendants took and carried away certain other goods and chattels belonging to the defendant in addition to those described in the writ. The replevin suit was pending in said district court at the time of the trial of these cases, and, so far as appears, has not yet been tried, so that there has been no judicial determination as to the ownership of the goods and chattels replevied. At the trial of the cases in the common pleas division the plaintiff recovered a verdict in each for the sum of one hundred dollars; and the defendants respectively have peti-

tioned for a new trial on several grounds, two only of which are now relied on, viz.: 1. That the court erred in admitting evidence as to the value of the goods taken; and 2. That it refused to charge the jury that the officer charged with the service of said writ of replevin was justified in breaking and entering the plaintiff's house, after a demand and refusal of admittance, for the purpose of making service of said writ; and that said writ was a full and complete protection to the defendant. The court, on the contrary, charged the jury, in substance, that the officer had no right to break and enter the plaintiff's house for the purpose of serving said writ, and that both he and the defendant Donnelley committed a trespass in so doing. The defendants duly excepted to the rulings. The only question before us, therefore, is as to the correctness of said rulings.

We think the first ruling complained of was correct. The evidence offered as to the value of the articles taken away by ~~424~~ the defendants, as we understand it, was finally limited to those articles which the plaintiff claimed belonged to him or his family, and which were not included in the replevin writ. As to such articles, of course the plaintiff had the right to prove their value.

We think the second ruling also was correct. For, while there seems to be some slight conflict in the authorities as to whether an officer who has broken into a dwelling-house and made an attachment, or taken property found therein in pursuance of his precept, may not lawfully hold the same (although the decided weight of authority is to the contrary—see the leading case of *Isley v. Nichols*, 12 Pick. 270, 22 Am. Dec. 425; *People v. Hubbard*, 24 Wend. 369, 35 Am. Dec. 628; *State v. Hooker*, 17 Vt. 670-673; 2 Freeman on Executions, 2d ed., sec. 255, and cases cited), yet it is almost universally conceded that the officer who breaks and enters a dwelling-house for the purpose of serving any civil process therein, except, perhaps, as hereinafter mentioned, is a trespasser; this position being based on the ground that the law will not permit the sanctity of one's dwelling-house, which from very ancient times has been regarded as his castle, to be violated in this way. In short, the law provides, and wisely too, we think, that the means of obtaining possession of personal property in civil process must be in subordination to the common-law rights of the defendant. "Public policy," says Campbell, J., in *Bailey v. Wright*, 39 Mich. 96, "requires above all things that courts

and officers executing their process shall respect the lawful rights of all persons. The practical permission which over-zealous officers would receive to commit wrongs with substantial impunity, if their levies should be held good without regard to the manner of their enforcement, would remove every check on lawlessness. To hold that an act is lawful which may be lawfully resisted is absurd. Such misconduct should neither be justified nor winked at."

Blackstone says a sheriff may not break open any outer doors to execute either a fieri facias or a capias ad satisfaciendum; but he must enter peaceably, and may then, after a request and refusal, break open any inner doors belonging to ⁴⁸⁵ the defendant, in order to take the goods: 3 Blackstone's Commentaries, 417. And in *Snydacker v. Brosse*, 51 Ill. 357, 99 Am. Dec. 551, the court says: "It is believed that what is said by Blackstone regarding said writs is true of all civil process."

Cases to the same general effect are numerous; but in view of the fact that in *Clark v. Wilson*, 14 R. I. 11, this court held the same doctrine, it is unnecessary to cite them. In this case, Durfee, C. J., said: "It is perfectly well settled that an officer ordinarily has no authority to break an outer door or window of a dwelling-house in order to enter it for the purpose of executing a civil writ or process."

But the defendants' contention, as we understand it, is that in serving a writ of replevin, at any rate, the officer has the right, after demanding admittance and being refused, to break into a dwelling-house in order to execute his precept. Some authority for this distinction is to be found in a few of the cases cited by defendants' counsel, but it is too vague and unsatisfactory to be controlling. Thus in *Keith v. Johnson*, 1 Dana, 604, 25 Am. Dec. 167, cited by defendants, it was held that the sheriff, having an execution under the statute of that state passed in 1828, had the right to make a forcible entry into the defendant's house to levy it on a slave for which it had issued on a judgment in detinet. An examination of the case, however, shows that while the court was of the opinion that such a right existed at common law, yet that the decision was based upon the statute. We do not, therefore, consider the case of much value as an authority for the defendant.

Kneas v. Fidler, 2 Serg. & R. 263, while it was an action of replevin, is not only not an authority in support of the defendants' position, but rather to the contrary, as there it did not

appear how the defendants got into the house, and the court said it could not be presumed that they broke the outer door.

The case of *Link v. Harrington*, 23 Mo. App. 429, is very blindly reported, and it is impossible to tell whether the officer entered a dwelling-house or not, but probably not, as no dwelling-house is mentioned; and the natural inference is ⁴²⁸ that the premises referred to, which the officer entered for the purpose of levying a writ of attachment upon certain goods therein belonging to a third party, of which premises it is stated that he assumed exclusive control for twenty-four hours or more, consisted of some building other than a dwelling-house.

In Wells on Replevin, section 287, also cited by defendants, the author says: "Authorities in modern times upon this question are meager, but it has been held that the sheriff had a right to enter the defendant's house to search for goods described in a writ of replevin"; and in support of this statement he refers, amongst others, to *Semayne's Case*, 5 Coke, p. 188, fol. 91 (see part 5; also, *Smith's Leading Cases*, 213). That case is not an authority in support of the proposition above enunciated, except to a limited extent, as will be presently shown, but is generally to the contrary and was cited by Durfee, C. J., in support of his opinion in *Clark v. Wilson*, 14 R. I. 11. It was held in *Semayne's Case*, 5 Coke, 188, that in all cases where the king is party the sheriff may break the house either to arrest or do other execution of the king's process, if he cannot otherwise enter; and also that where the door is open the sheriff may enter and do execution at the suit of a subject, and so also may the lord, and distrain for his rent service. But it was also held that it was not lawful for the sheriff, on request made and denial, at the suit of a common person, to break the defendant's house, to execute any process at the suit of a subject. The limited extent to which the case is an authority for the proposition above stated by Mr. Wells is in circumstances like the following, viz.: Where the goods of A are brought and conveyed into the dwelling-house of B, with his knowledge and consent, to prevent a lawful execution or to escape the ordinary process of law, this amounts to fraud and covin on the part of B, and in such case the sheriff, after denial of admittance, on request made, may break the house. "For the privilege of one's house," said the judges, "extends only to him and his family and to his own proper goods, or to those which are lawfully and without fraud and covin there": See cases cited on page 228 ⁴²⁷ (183) of *Smith's Leading Cases*, in a note to *Semayne's Case*, 5 Coke,

188. To the same effect are *Burdett v. Abbott*, 14 East, 157, and *De Graffenreid v. Mitchell*, 3 McCord, 506, 15 Am. Dec. 648.

The statute of Westminster I, chapter 17, cited by defendants, even conceding it to be in force in this state, is but an affirmation of the common-law doctrine above enunciated. It declares in effect that the sheriff may break a house or castle to make replevin, when the goods of another which he has distrained are by him conveyed to his house or castle to prevent the owner to have a replevin of his goods, provided the sheriff first make demand for the goods: See, also, 8 Bacon's Abridgment, sec. 7, p. 547.

The other cases cited by Mr. Wells in support of the text, viz., *State v. Smith*, 1 N. H. 346, and the cases referred to in a note to *McGee v. Given*, 4 Blackf. 16, go no farther, at the most, than to sustain the ruling made in *Semayne's Case*, 5 Coke, 188, and do not hold, generally, that an officer may break into a dwelling-house to serve a writ of replevin. *Boggs v. Vandyke*, 8 Harr. (Del.) 288, is a case where the sheriff attempted to justify the breaking and entering the plaintiff's house and taking his goods by showing that he did so in connection with the service of an execution against the plaintiff. The court ruled that the officer had no right to open an outer door and sustained the plaintiff's action of trespass: See, also, *Haggerty v. Wilber*, 16 Johns. 287, 8 Am. Dec. 321. We have examined the other cases which are referred to in a general way by the defendants, viz., those cited in 2 American and English Encyclopedia of Law, second edition, 853, note 1, but do not find that they are controlling, or that they furnish much support for the defendants' claim in the case at bar. Indeed, most of the cases are directly to the contrary. See, for instance, *Calvert v. Stone*, 10 B. Mon. 152, decided by the same court as was *Keith v. Johnson*, 1 Dana, 604, 25 Am. Dec. 167, and nearly twenty years afterward, *State v. Hooker*, 17 Vt. 670, and *People v. Hubbard*, 24 Wend. 369, 35 Am. Dec. 628.

A somewhat careful investigation of the authorities independently of those cited by counsel confirms us in the opinion to which we have arrived. Murfree on Sheriffs, section 268, lays ⁴⁰⁸ down the broad proposition that "an officer cannot break the outer doors of a house to execute a fieri facias or any other civil process, against the owner, and if he does so he becomes a trespasser." Hitchcock on New England Sheriffs and Constables takes the same view and cites with approval the

Rhode Island case of *Clark v. Wilson*, 14 R. I. 11: See, also, *Drake on Attachment*, sec. 200; *Cobbey on Replevin*, sec. 647.

In *Prettyman v. Dean*, 2 Harr. (Del.) 494, which was an ordinary case of replevin, Clayton, C. J., in delivering the opinion of the court, said: "The sheriff has a right to enter a house peaceably, where he finds the house open, for the purpose of executing a replevin. Being in, he has the right to execute his writ. If property be concealed, he has the right to break open inner doors, and generally to use such force as is necessary to enable him to obey the command of his writ."

The late case of *State v. Beckner*, 132 Ind. 371, 32 Am. St. Rep. 257, is clearly in point. There the officer was sued on his official bond, and the question which arose was whether he had the right to forcibly enter the dwelling-house of the relator to serve a writ of replevin. The court decided that the writ was but a civil process and did not authorize him to force the outer door of a dwelling-house.

Whether there is any sufficient reason on principle for making the distinction, referred to in the books, between an ordinary case of replevin and a case where the goods and chattels sought to be obtained have been distrained or are fraudulently concealed by the defendant in his house, may be open to doubt: See 2 *Freeman on Executions*, 2d ed., sec. 256, p. 817. But conceding that in such circumstances an officer would be warranted in breaking into a dwelling-house to make service of such a writ, or of a writ of fieri facias against a stranger whose goods are wrongfully withheld from the officer in the house, yet, as the cases at bar do not fall within either of those classes, the fact that the law may be as intimated by Mr. Freeman, and also in *Douglass v. State*, 6 Yerg. 529, 8 *Bacon's Abridgment*, 547, *Burton v. Wilkinson*, 18 Vt. 189, 46 Am. Dec. 145, and other cases hereinbefore cited, cannot control our decision. The case out of which the present suits arise was a simple and ⁴³⁹ ordinary case of replevin. And we are very clearly of the opinion that the defendants committed a trespass when they broke and entered the plaintiff's house to make service of said writ.

Petition for new trial denied, and cases remitted to the common pleas division with direction to enter judgment on the verdict.

PROCESS.—AN OFFICER MUST NOT BREAK open the doors of a dwelling-house to effect the service of civil process: See the monographic note to *Hawkins v. Commonwealth*, 61 Am. Dec. 155-157.

TUCKER v. CARR.

[20 Rhode Island, 477.]

JUDGMENTS—RES JUDICATA—DEFENSE AVAILABLE ON FIRST TRIAL.—After final judgment in attachment, a release alleged to have been given after the attachment and before the return day of the writ is not available as a defense in an action on the bond given to release the property from attachment. Such defense was within the knowledge of the defendant, and should have been pleaded in the suit on the attachment, and he is concluded by the judgment therein.

JUDGMENT—RES JUDICATA AVAILABLE.—A judgment is conclusive against all defenses which might have been set up before it was rendered, and this is true for the purposes of every subsequent suit between the same parties and their privies, whether founded upon the same or a different cause of action.

EXECUTIONS.—DEATH OF PLAINTIFF after judgment suspends the right to issue execution until the judgment is revived by scire facias.

ATTACHMENT—BOND—RETURN OF GOODS.—If a bond given to release an attachment contains a provision that it shall be void if, at any time after final judgment, the goods, upon request therefor, shall be returned to the officer taking the bond, the possession of an execution upon such judgment is not necessary, to enable the officer to demand a return of the property.

S. W. K. Allen, for the plaintiff.

S. O. Edwards, W. F. Angell, and S. Edwards, for the defendants.

⁴⁷⁷ STINESS, J. August 8, 1884, Abby Lawton sued out a writ against Albert H. Carr, in assumpsit for rent, which ⁴⁷⁸ was served August 14, 1884, by attachment both of real and personal property. The next day the sheriff surrendered the personal property attached, upon a bond, under Public Laws of Rhode Island, caption 207, section 20. At the November term, 1889, of the court of common pleas in Washington county, judgment was entered for the plaintiff for one thousand and twenty-six dollars and thirty-eight cents. Abby Lawton died November 22, 1888. Execution issued December 7, 1888. Edward Tucker, deputy sheriff, demanded a return of the property and then brought suit on the bond, January 9, 1889; and at the September term of this court in Kent county, 1889, judgment was rendered thereon against all defendants; and, on chancerization, execution was ordered for five hundred and forty dollars and fifty cents. November 19, 1889, a petition for a new trial was filed, and execution stayed. This continued until May 20, 1896, when the petition was dismissed and

execution ordered. May 26, 1896, this motion for a new trial and for a stay of execution was filed. It is based upon the grounds that Abby Lawton gave to Albert H. Carr a general release under seal, August 21, 1884, between the service of the writ and the return day, in view of which the plaintiff ought not to hold his judgment and execution; and also that the execution was void, by reason of the death of the plaintiff, and so no valid demand for the return of the property could be made under it.

We cannot sustain the motion upon the first ground. The original case in which the bond was given was pending more than three years after the date of the alleged release before judgment was rendered. We are not informed that the release was pleaded, but we infer, from statements in the brief of the defendants, that it was not. If it was pleaded, we are bound to presume that the court found it to be invalid, for fraud, want of consideration, or other cause; because otherwise the court could not have given judgment for the plaintiff, and the judgment upon such plea would be conclusive of the matter. If it was not pleaded, still the judgment is conclusive. It was within the knowledge of the defendant; he could have pleaded it; and a judgment is conclusive against all defenses which might have been set up before it was rendered. ⁴⁷⁹ And this is true for the purposes of every subsequent suit between the same parties and their privies, whether founded upon the same or a different cause of action: 2 Black on Judgments, sec. 754. . In *Bird v. Smith*, 34 Me. 63, 56 Am. Dec. 635, the court says: "The judgment is conclusive evidence that it was due to its full amount when recovered. And the introduction of evidence, which existed before the rendition of the judgment, to show that it is not all due, would impair the force and effect which the law gives to it." In *Shackleford v. Cunningham*, 41 Ala. 203, the court held that, on motion to enter satisfaction, the judgment of a court of probate is conclusive, and that no matter antecedent to the judgment and involved in it can be brought forward in support of such motion. In that case the antecedent matter was that the funds in the hands of the defendant were in confederate notes of no value: See, also, *Biddle v. Wilkins*, 1 Pet. 686; *Foster v. Wood*, 6 Johns. Ch. 87. The case of *Merrifield v. Baker*, 11 Allen, 43, cited by the defendants, was a suit in which a release was expressly set up as a defense, and, therefore, it is not in point upon this question.

The defendants claim that the release was lost and not found until recently. It does not appear when it was lost, but Carr's agent and bondsman in the original case says that it was in his hands at the court to which the writ was returnable, and that he delivered it to an attorney with the request to answer the case. It could, therefore, have been pleaded, and, if subsequently lost, it could have been proved by secondary evidence.

Moreover, as we have said, the case was pending for three years before judgment, and, under our law, a year after judgment is allowed within which to petition for a new trial; but during all this time, so far as appears, the claim of a release was not brought upon the record. About a year after the judgment Abby Lawton died, and suit was brought upon the bond, and at the September term, 1889, judgment was rendered. A petition for new trial was then filed, in which the claim of a release was made. The petition was pending until April, 1896, when it was dismissed, and thereupon ⁴⁸⁰ the present motion was filed and now the release is produced. In view of this lapse of time, of the neglect to answer the two suits, after two judgments and after the death of Abby Lawton, who alone could dispute the release, we think that the defendants come too late to urge that ground, either for a rehearing or for a stay of execution. As was said by the court in *Draper v. Bishop*, 4 R. I. 489, a case of less delay than this, it seems like a new mode of defending against a claim. And if a new trial of the suit on the bond should be given, it could avail the defendants nothing, for they could not go behind the judgment, and, therefore, upon the release they could have no defense.

But, in addition to this, we may properly say that we are not satisfied that the application is made out upon its merits. According to the affidavits, it was a release given without any consideration by a woman feeble in health and over eighty years of age, upon the claim that Carr owed her nothing. It also appears that her claim was for rent; that Carr had lived upon her premises for a number of years; that he vacated the premises afterward under threat of an action in ejectment; that Mrs. Lawton said to her attorney that Carr had owed her for some small sums of money borrowed from her by him, which he had paid and for which she had given him a receipt, which may have been the release in question. In view of these statements, and more especially of Carr's conduct as to the release, we are not satisfied as to its validity.

The second ground of the motion is that no legal demand was made for the property, because the execution, which issued after the plaintiff's death, was void.

Undoubtedly, at common law the death of the plaintiff, after judgment, suspends the right to issue execution until the judgment is reviewed by *scire facias*: 1 Freeman on Executions, 2d ed., sec. 35. The execution in the original case was therefore irregular. In *Hodges v. White*, 19 R. L. 717, we held that the execution issued after the death of a party was voidable and not void. But that question is not important on the present motion. The statute (Pub. Laws, cap. 207, sec. 20) ⁴⁸¹ does not require that the officer should have the execution in order to make a demand. The language of the condition is that the bond shall be null and void if, at any time after final judgment, the goods shall, upon request therefor, be returned to the officer taking such bond, or to any officer who shall be charged with the service of an execution levied upon the judgment rendered in such action. The word "levied," as used above, does not make sense of the sentence. It is evidently a misprint, and in General Laws, caption 253, section 18, it was changed to "issued" upon the judgment. The condition of the bond would, therefore, be satisfied by a return, on request, either to the officer who took the bond, or to an officer who should be charged with the service of an execution issued on the judgment, unless such judgment shall have been paid.

We therefore decide that the demand made by Tucker was sufficient to maintain the action, and that there is no ground for a new trial upon the second point.

Motion dismissed.

RES JUDICATA.—A judgment is final, not only as to the subject matter, but also as to every other matter which the parties might have litigated and had decided: *Hentig v. Redden*, 46 Kan. 231, 26 Am. St. Rep. 91; *Slater v. Skirving*, 51 Neb. 108, 66 Am. St. Rep. 444. If a party fails to plead or prove a fact which he might have pleaded or proved, this cannot limit the force of the judgment while it remains in force: *Freeman v. McAninch*, 87 Tex. 132, 47 Am. St. Rep. 79.

AN EXECUTION ISSUED AFTER THE DEATH of the person in whose favor the judgment was rendered is void: *Stewart v. Nuckols*, 15 Ala. 225, 50 Am. Dec. 127. See, also, *Seeley v. Johnson*, 61 Kan. 337, 78 Am. St. Rep. 314. But an execution does not abate by the death of the plaintiff after a *fiery facias* has been levied, but a *venditioni exponas* may issue: *Buckner v. Terrill*, Litt. Sel. Cas. 29, 12 Am. Dec. 269.

SCIRE FACIAS TO REVIVE A JUDGMENT after the death of a party thereto is discussed in the monographic note to *Frierson v. Harris*, 94 Am. Dec. 226-228.

GARDNER v. SWAN POINT CEMETERY.

[20 Rhode Island, 646.]

CEMETERIES—BURIAL LOTS.—While a burial lot is regarded as property, the title to which in most cases descends to the heirs, the tenure is generally unlike that of ordinary real estate.

CEMETERIES—BURIAL LOTS.—Though a deed to a cemetery lot may run to the grantee, his heirs and assigns, he takes only an easement or right of burial, rather than an absolute title, and so long as the land is used for burial purposes he cannot exercise the same rights of ownership as in other real estate.

CEMETERIES—BURIAL RIGHTS.—Buried human bodies must remain undisturbed, and the right and duty falls to the next of kin to see that such repose is duly protected and preserved.

CEMETERIES—BURIAL RIGHTS.—Burial of a human body by the consent of those most interested is regarded in law as a final sepulture, which cannot be disturbed against the will of those who have the right to object, generally the next of kin, on account of change in feeling or circumstances.

CEMETERIES—BURIAL LOTS—BURIAL RIGHTS.—A deed to a cemetery lot, merely reserving to the grantee the right of burial therein, must be construed to mean the right of burial in a part of the lot vacant at the time of the execution of the deed, and neither the grantor nor the grantee has the right to thereafter dig up and remove a body already buried there for the purpose of creating such vacancy.

H. Almy and J. M. Gilrain, for the plaintiffs.

E. D. Bassett, E. L. Mitchell, R. B. Comstock, and R. Gardner, for the defendants.

647 STINESS, J. According to the averments of the bill, Jonathan M. Wheeler, late of Cranston, gave by will to the respondent, Laura Wheeler, all the residue of his estate, real and personal, a part of which was his burial lot in Swan Point Cemetery. His mother, Barbara Wheeler, a son by his former marriage, Oscar Wheeler, his first wife, and others were buried in the front part of the lot and he was also buried there, in a space reserved for himself, and these dispositions were made by his express direction. A contest of the will by the complainant resulted in the withdrawal of opposition, upon the execution of a deed of the burial lot by Laura Wheeler to the cemetery corporation in trust "for a place for the interment for me, the grantor, and for me only, in addition to those already buried therein, and subject during my lifetime to my visiting and remaining on said grounds during all reasonable hours." After this, at the request of Laura Wheeler, the corporation caused the body of the son, Oscar, to be removed from the place where

it had lain since 1864, and the space to be marked, "Place reserved for Laura, wife of J. M. Wheeler." The complainant has requested the corporation to return the body to the place from which it was removed, which request has been refused. The respondents demur to the bill.

While a burial lot is regarded as property, in which title ⁶⁴⁸ may in most cases descend to heirs (Field v. Providence, 17 R. I. 803), it is evident that the tenure generally is not like that of ordinary real estate. We do not know what the charter provisions of the Swan Point Cemetery may be in regard to title of lots, but in the cases of churchyards and cemeteries, it has been held that, though a deed may run to a grantee, his heirs and assigns, he takes only an easement or right of burial, rather than an absolute title: Richards v. Northwest etc. Church, 32 Barb. 42; Sohler v. Trinity Church, 109 Mass. 1; Went v. Methodist etc. Church, 80 Hun, 266. So long as the land is used for burial purposes he cannot exercise the same rights of ownership as in other real estate. Thus, in Thompson v. Hickey, 59 How. Pr. 434, it was held that a burial lot could not be mortgaged, and in Derby v. Derby, 4 R. I. 414, it was held that it did not fall within a power of sale given by an executor for the payment of debts and legacies, but that it passed to the heir at law of the testator. Following this case, it would not pass under a residuary gift, but would descend to the heirs as intestate property. In Sabin v. Harkness, 4 N. H. 415, 17 Am. Dec. 437, citing ancient authority, it was held that those who erect gravestones may maintain an action for any injury done to them during their time, but after their decease the action belongs to the heirs of him to whose honor and memory the stones were erected. In Pearce v. Swan Point Cemetery, 10 R. I. 227, 14 Am. Rep. 667, the right of the heir was sustained as against a widow who had removed the body of her husband from the family burial lot. In Mitchell v. Thorne, 134 N. Y. 536, 30 Am. St. Rep. 699, it was held that the heirs of a decedent at whose grave a monument has been erected can recover damages from one who wrongfully injures or removes it, or by an injunction may restrain one who without right threatens to injure or remove it, and this though the title to the ground, wherein the grave is, be not in the plaintiff, but in another.

The principle of all the cases seems to be that the buried body shall remain undisturbed, and that the right and duty falls to the next of kin to see that its repose is duly protected. This

right "after burial" was referred to in *Hackett v. Hackett*, 18 R. I. 155, 49 Am. St. Rep. 762, as one to be distinguished from right of custody and disposal of the body at the time of burial, when other considerations than kinship may often arise. This same distinction was noted in *Fox v. Gordon*, 16 Phila. 185, which has a full and instructive opinion on this subject, wherein it was held that even a husband and father had not the right to remove the bodies of his wife and child from the wife's family lot in which they had been buried with his consent. In *Hackett v. Hackett*, 18 R. I. 155, 49 Am. St. Rep. 762, this court held that the widow was entitled to the custody and control of the body of her husband after a burial against her protest and under threats and fear of a disgraceful scene.

Thus, it appears that a burial by the consent of those most nearly interested is regarded in law as a final sepulture, which cannot be disturbed against the will of those who have the right to object, generally the next of kin, on account of change in feeling or circumstances. We do not say that there may not be possible exceptions to this rule, since it is more a rule of ethics than of law, but it is safe to say that in law it is recognized as the general rule.

In view of what we have said, it follows that the respondents had not the right, by reason of title in the lot or guardianship over the body of Oscar Wheeler, to remove his remains; but we think there is another ground which is sufficient to estop the respondents from claiming such authority.

The complainant withdrew her appeal from the probate of the will upon the consideration of the execution of the trust deed of the burial lot to the corporation. Evidently she had a strong feeling in regard to this lot, which adjoins her own, as she was willing to withdraw her appeal upon the assurance that it should not be disturbed, except by the burial of Mrs. Wheeler therein, and her right to visit it. When Mrs. Wheeler reserved these rights and nothing more, and put the title, if she had any, in the corporation in trust only for the exercise of those specific rights, it is clear that she no longer had, if she ever had, the right to remove a body which had been buried there. Of course, it may be said that it is ⁶⁵⁰ proper that she should be buried by the side of her husband, and she might have said so in her deed. Perhaps if she had said so the will contest would not have been settled. But she did not say it and the deed does not imply it. In reserving the right to be buried in the lot, and nothing more, it could only mean in a vacant part of the

lot, and this inference is strengthened by the words "in addition to those already buried therein." It would not give anybody to understand that she was first to remove a body already buried there.

We are therefore of opinion that neither Mrs. Wheeler nor the corporation had authority to remove the body of Oscar Wheeler. In view of a suggestion in the bill that there may be a satisfactory arrangement by a proposed change, we simply say now that the bill states a case and the demurrer is overruled.

CEMETERIES.—THE PURCHASE OF A LOT in a cemetery for burial purposes does not take any title to the soil: *Kincaid's Appeal*, 66 Pa. St. 411, 5 Am. Rep. 877.

BURIAL RIGHTS are discussed in the monographic notes to *Keyes v. Konkell*, 75 Am. St. Rep. 424-430; *Wynkoop v. Wynkoop*, 82 Am. Dec. 509-516.

METCALF v. TIMES PUBLISHING COMPANY.

[20 Rhode Island, 674.]

LIBEL.—PRIVILEGED COMMUNICATIONS—COURT PROCEEDINGS.—A full and fair report of proceedings in open court upon a matter standing for final decision, even though the inquiry may be preliminary and ex parte, is privileged. This rule, however, gives no license to publish libelous matter simply because it is found in the files of a court.

LIBEL.—PUBLICATION OF CHARGES FILED IN COURT. One person may make charges against another for adjudication and as to him they are privileged, but this does not confer upon others the right to publish and spread them before they come up for adjudication, and such publication may be libel.

LIBEL.—PRIVILEGED COMMUNICATION—COURT PROCEEDING, WHAT IS.—An application made in chambers before a single judge upon a motion for an ex parte injunction before and until a hearing is a proceeding in court, a fair and full report of which may be published as privileged matter.

LIBEL.—PUBLICATION OF PLEADINGS OR COURT PROCEEDINGS.—Whether judicial proceedings be in a court of record or not, finished or unfinished, ex parte or otherwise, no individual and no newspaper has the right to publish mere arbitrary selections from the proceedings or the pleadings in the case, consisting of those portions which impute crime or moral turpitude to, or cast ridicule or odium upon, the person to whom they refer. Such garbled report of the pleadings or the proceedings is not privileged, and its publication is a libel.

H. J. Carroll and W. H. Greene, for the plaintiff.

J. Osfield, Jr., S. A. Cooke, and L. A. Angell, for the defendant.

675 STINESS, J. The plaintiff sues to recover damages for a libel alleged to have been printed in the "Evening Times," a newspaper in Pawtucket, published by the defendants. The declaration sets out that upon the filing of a bill in equity by Annie Campbell against the plaintiff and other associates in business, charging them with having conspired to defraud her deceased husband, Duncan H. Campbell, of certain letters patent of this and foreign countries, and, upon the order by a justice for citation and an ex parte preliminary injunction until hearing, the defendants published the charges of fraud, to the damage of the plaintiff.

The defendants plead specially that the said "Evening Times" was a public newspaper; that they published said matters because they believed them to contain information which it was important for the public to know; that said matters were a part of the public records of this court, upon which there had been judicial action, which, denying all malicious intent, it was lawful for them to do. The plaintiff demurs to the plea.

The question of privileged publications is one that has been much considered, and certain lines may now be said to be well established.

In *The King v. Wright*, 8 Term Rep. 293, in 1799, which was an application for a criminal information for libel growing out of the *Horne v. Tooke* case, it was held that a report of the house of commons could be published, even though it reflected on the character of an individual. *Hoare v. Silverlock*, 9 Com. B. 20, was to the effect that a full and impartial report of a trial in a court of justice could be published. Some stress was laid upon the distinction between a full trial and an ex parte proceeding, which, however, was not necessary to the decision of this case. *Davison v. Duncan*, 7 El. & B. 229, held that a fair report of defamatory matter uttered in a public meeting was not privileged. *McGregor v. Thwaites* (1824), 3 Barn. & C. 24, 10 Eng. C. L. 6, held that proceedings before a magistrate, not judicial but advisory, were not privileged, and *Duncan v. Thwaites*, 3 Barn. **676** & C. 556, 10 Eng. C. L. 179, extended the rule to proceedings which took place in the course of preliminary inquiry before a magistrate. *Lewis v. Levy*, El. B. & E. 535, questioned the decision in *Duncan v. Thwaites*, 7 El. & B. 229, and although the case was understood to hold that the privilege of a fair report extended to proceedings taking place publicly before a magistrate on the preliminary investigation of a criminal charge, terminating in the discharge of the

prisoner, yet the court did not expressly decide that question. *Regina v. Gray*, 10 Cox C. C. 184, carried the rule to this extent, but the court was not unanimous in the decision.

In *Usil v. Hales* (1878), 47 L. J. 323, Lord Coleridge, C. J., fully adopted the apparent rule of *Lewis v. Levy*, El. B. & E. 535, and *Lopes, J.*, concurring, said: "There are authorities which, until they are carefully examined, would seem to support the contention that an *ex parte* proceeding in court is not privileged. So far as I can ascertain, these are cases where the proceeding was preliminary, and where there was no final determination at the time of the alleged libelous report." In *Wason v. Walter*, L. R. 4 Q. B. 73, the dictum of Cockburn, C. J., goes further, that fair reports of all *ex parte* proceedings are privileged. *Ryalls v. Leader*, L. R. 1 Ex. 296, held that the examination of a debtor in custody before a registrar in bankruptcy was a proceeding before a public court, and hence privileged.

In *Kimber v. Press Assn.* (1893), 1 Q. B. 65, the court went to the full length of holding that the publication of a fair report of proceedings held in open court, though preliminary and *ex parte*, is privileged. This case is quite remarkable from several facts. It was an application to magistrates, specially called together by the clerk, for a summons to one charged with perjury, and no evidence was given under oath. The application was granted, and one of the principal questions argued was whether it was an open court. It was also held that the matter was one for final determination, because if it was refused it would be final, and ⁶⁷⁷ if it was granted there would be a further inquiry and the matter might go on to trial.

Following the outline of leading decisions, in which there has been a gradual progress, the law of England seems now to be that a full and fair report of proceedings in an open court upon a matter standing for final decision, even though the inquiry may be preliminary and *ex parte*, is privileged: See opinion of Kay, L. J., in *Kimber v. Press Assn.* (1893), 1 Q. B. 65.

In this country the law has been declared in very much the same way. In *Cincinnati Gazette Co. v. Timberlake* (1860), 10 Ohio St. 548, 78 Am. Dec. 285, it was held that privilege does not extend to the publication of preliminary proceedings merely, which are of a purely *ex parte* character. The opinion, however, follows the earlier English cases.

Barber v. St. Louis Dispatch, 3 Mo. App. 377, laid down this rule: "Where a court or public magistrate is sitting publicly, a fair account of the whole proceedings, uncolored by defamatory comment or insinuation, is a privileged communication, whether the proceedings are on a trial or on a preliminary and ex parte hearing. But the very terms of the rule imply that there must be a hearing of some kind. In order that the ex parte nature of the proceeding may not destroy the privilege—to prevent such a result—there must be at least so much of a public investigation as is implied in a submission to the judicial mind with a view to judicial action." In this case a petition for divorce had been filed, but it had not been presented to a court at any sitting, with a view to judicial action.

In Park v. Detroit Free Press, 72 Mich. 560, 16 Am. St. Rep. 544, it was held that the publication of the pleadings or other contents of the files in a private suit before hearing or action in open court is not privileged. McBee v. Fulton, 47 Md. 403, 28 Am. Rep. 465, held that an examination before a magistrate, whether the accused permits them to be ex parte or whether he makes defense, is privileged, upon the ground that it is a proceeding before a public court of justice.

In New York a statute of 1854, limiting actions for the publication of a fair and true report of judicial proceedings to cases of malice, was held to be declaratory of the common law in Ackerman v. Jones, 5 Jones & S. 42, and that under the statute an ex parte affidavit presented to a police magistrate to obtain a search warrant was privileged.

Cowley v. Pulsifer, 137 Mass. 392, 50 Am. Rep. 318, contains a full review of this subject by Mr. Justice Holmes. It was an action for libel in publishing a petition for the removal of an attorney from the bar, which had not been presented to the court. The question, therefore, was quite different from the one before us, but the court assumes the rule admitted by the plaintiff in that case, that the privilege attaches to fair reports of judicial proceedings even if preliminary and ex parte.

The rule, as thus stated, seems now to be settled as the law, both in England and in this country, and it makes a clear line of distinction between publications which are lawful and those which are not.

It gives no license to publish libelous matter simply because it is found in the files of a court. As a publisher of news and items of public importance the press should have the freest scope; but as a scandal-monger, it should be held to the most

rigid limitation. If a man has not the right to go around to tell of charges made by one against another, much less should a newspaper have the right to spread it broadcast and in enduring form. It is necessary to the ends of justice that a party should be allowed to make his charges against another for adjudication, even though they may be of a libelous character, and as such they are privileged, the injured party having a remedy for malicious prosecution when they are made maliciously or without probable cause. But the right of a party to make charges gives no right to others to spread them. When the charges come up for adjudication, however, although their publication may be as harmful and distressing to the person accused as if they had been published before their consideration by a court, a different rule applies. Individual feelings are no longer considered, for the reason, as stated by Judge Holmes: "It is desirable that the trial of causes should take place under the ⁶⁷⁹ public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed."

Accepting and applying the rule as we understand it to be, two questions arise: 1. Does the plea set forth a proceeding before a court? and 2. Does it aver it to be a full and fair report?

As to the first question, it sets out an application in chambers, upon a motion for an ex parte injunction before and until a hearing. Ordinarily, the only consideration which is, or can be, given to it is whether the bill states an exigency upon its face sufficient to warrant an order to hold property in statu quo until a hearing can be had. This is indeed a judicial matter, but of the most insignificant sort and very near to the border line. It is a matter submitted to a judge, and he acts upon it. It is within the rule and the cases which we have referred to, notably that of *Kimber v. Press Assn.* (1893), 1 Q. B. 65. If this was not judicial action, it would be difficult to say what would be, short of a full trial of the case. Although the motion was in chambers, still, under our practice, as all such motions and interlocutory orders are made in chambers, technically we cannot say that it was not in court. The statutes provide for such motions to be made to the court, and the provisions about the court "in chambers" are simply to dis-

tinguish such proceedings from those of the appellate division sitting in Bank. We therefore decide that the plea sets out a sufficient statement of a proceeding in court.

As to the second question, to bring the plea within the rule of full and fair report, the plea is bad upon its face. It avers that what is published was only a part of the bill, and this part, so far as shown, was only the four paragraphs charging fraud. It does not aver that the defendants gave a full and fair report, even in substance, of the allegations and facts set out in the bill. The plea rests upon the fact ⁶⁸⁰ that, as the bill had been before a judge in a judicial proceeding, it was a justification in publishing a part of it. That is not enough. If a garbled report of a trial, which may result in a vindication of one accused, is not privileged, much less should unfair extracts from pleadings be privileged. This doctrine is strongly set forth in caustic words by Endlich, J., in *Commonwealth v. Costello*, 1 Pa. Dist. Rep. 745-752: "I prefer to rely upon the proposition, which seems to me incontestable, that, whether the proceeding be in a court of record or not, finished or unfinished, ex parte or otherwise, no individual and no newspaper has the right to publish mere arbitrary selections consisting of those portions which impute crime or moral turpitude to, or cast ridicule or odium upon, the party to whom they refer, and commending themselves only by what is sometimes called spiciness, but is more properly denominated filth, or by reason of the fact that they tickle the morbid appetite of perverted human nature, which delights in the spectacle of another's disgrace."

Upon this ground, therefore, the demurrer to the plea is sustained, and the case will be remitted to the common pleas division for further proceedings.

LIBEL.—A PUBLICATION OF JUDICIAL PROCEEDINGS is not privileged unless fair and impartial: See the monographic note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 364.

LIBEL.—THE PARTIES TO AN ACTION are privileged from suit for accusations made in their pleadings: *Park v. Detroit Free Press Co.*, 72 Mich. 560, 16 Am. St. Rep. 544; *Ball v. Rawles*, 98 Cal. 222, 27 Am. St. Rep. 174; *Gardemal v. McWilliams*, 43 La. Ann. 454, 26 Am. St. Rep. 195. But see *Sherwood v. Powell*, 61 Minn. 479, 52 Am. St. Rep. 614. However, the public has no right to any information on private suits until they come up for public hearing or action in open court, and when any publication is made involving such matters, they possess no privilege: *Park v. Detroit Free Press Co.*, 72 Mich. 560, 16 Am. St. Rep. 544; monographic note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 361-365.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

TELEPHONE COMPANY v. BROWN.

[104 Tennessee, 56.]

TELEPHONE COMPANIES—NEGLIGENCE—AUTHORITY OF EMPLOYEES.—If a telephone company knowingly permits its employes over its own lines to make arrangements contrary to instructions with customers, in ascertaining from such employes the cost of delivery of a message beyond the terminus of the line, and there collecting from the customer compensation for the entire work, then the fact that under its arrangement with its employes and distant operators they are to receive the pay for the delivery beyond the terminus can make no difference, so far as the customer is concerned, and the negligence of such operator, if proven, is the negligence of the company.

TELEPHONE COMPANIES—AUTHORITY OF AGENT.—No instructions of a telephone company to its operators, however formal and peremptory, can prejudice the rights of a customer, if it knowingly permits such agents to conduct its affairs upon a plan in direct conflict with such instructions. The course of business actually pursued by the company's agents with its knowledge is the proper and legal criterion of its responsibility to its customers.

TELEPHONE COMPANIES—DUTY TO DELIVER MESSAGES.—If a telephone company or its operator receives a message for delivery beyond its terminus, the duty to deliver promptly is absolute, and the operator has no right to speculate as to the probable effect of promptness or delay in delivering the message.

TELEPHONE COMPANIES—DELAY IN DELIVERING MESSAGE—DAMAGES.—In order for a father to recover for being deprived of seeing his daughter before her death, caused by the negligent delay of a telephone company in delivering a message received for transmission, he must prove that he both could and would have arrived and been with his daughter at the time of her death if the message had been delivered promptly.

Hill McAllister and Vertrees & Vertrees, for the appellant.

Douglas Wilke and Firman Smith, for the respondent.

57 CALDWELL, J. The Cumberland Telephone Company appeals in error from a judgment for five hundred dollars recovered against it by J. T. Brown for negligent delay in the delivery of a message.

Brown was a resident of the city of Nashville, but was temporarily at Hickman, a small village about fifty-eight miles from Nashville, and two miles beyond Gordonsville. The telephone company had an office at Nashville and one at Gordonsville, but none at Hickman.

In the afternoon of September 16, 1897, Brown's son went into the office at Nashville and stated to the operator there that he had an important message for his father at Hickman. The operator called the company's agent at Gordonsville, and put the son in communication with him. The son, availing himself of the instrument **58** and connection thus afforded, communicated his message to the Gordonsville agent, who agreed to deliver it at Hickman; and thereupon, according to the usual custom, the Nashville agent demanded and received sixty-five cents in payment of total charges, being twenty-five cents for the transmission of the message to Gordonsville and forty cents for its delivery at Hickman. The message, as written by the agent at Gordonsville, was as follows:

"Nashville, Tennessee, 9-16-97.

"Mr. J. Thomas Brown, Hickman, Tennessee.

"Come home immediately. Your daughter is dangerously ill.
(Signed) TOM BROWN."

Though received at Gordonsville at 5:15 P. M. of that day, and so marked on its face, the message was not delivered until about 8 or 8:30 A. M. the next day, which was near fifteen hours after the agent got it, and some five hours after the sendee's daughter's death, of which he learned thirty minutes later through another message transmitted over the same line, and likewise delivered at Hickman.

The company virtually concedes the foregoing facts, but, nevertheless, denies its liability in this case upon the ground that it had instructed its operators not to receive messages from anyone to be by any agent of the company delivered to the sendee, and that the undertaking of the Gordonsville **59** operator to deliver this message at Hickman was, therefore, without authority, and not binding on his principal.

It was in relation to this phase of the case that the trial judge gave the charge against which the first assignment of error in this court is directed. That charge is in this language, namely: "In the opinion of the court this instruction to employes is of little consequence, under the conceded facts of this case. If the company knowingly permitted its employes, over its own wires, to make such arrangements with customers, ascertained from such employes the cost of delivery beyond the terminus of the line, and there collected from the customer compensation for the entire work, then the fact that under its arrangement with its distant operators they were to receive the pay for the delivery beyond the terminus could make no difference so far as the customer was concerned; and the negligence of such operator, if proven, would be the negligence of the company itself."

We are not able to perceive any error in this charge, but, on the contrary, we regard it as entirely sound.

No instruction of the company to its operators, however formal and peremptory, could prejudice the rights of a customer if it knowingly permitted those agents to conduct its affairs upon a plan in direct conflict with that instruction. The ^{so} course of business actually pursued by the company's agents with its knowledge is the proper and legal criterion of its responsibility to its customers. As to the public its legal relation is that indicated by its recognized course of business, so long as the latter does not contravene some rule of positive law or sound public policy.

The habitual breach and disregard of the instruction by the operators of the company, with its knowledge, amounts to a practical abrogation of the instruction (*Railroad Co. v. Reagan*, 96 Tenn. 129, 140), and makes the status of the company that which its real course of business imports.

This is equally true, though the company was not bound in the first instance to receive and deliver messages at all, but only to furnish suitable instrumentalities for verbal communication between separated members of the public; for it had the legal power to assume the additional duty, and could do so as well in the manner indicated as by the promulgation of formal notice of such purpose.

Nor is it of any legal consequence in the present case that the Nashville operator may have testified that he told the sender of this message that the company would not undertake to de-

ver it, since he concedes that he furnished the connection with the express understanding that the Gordonsville operator was to be requested to deliver it, and with the assurance that he would do ⁶¹ whatever he agreed to do about it, and after the arrangement was consummated, collected the charges for delivery as well as for tolls, and turned the same into the treasury of the company.

The formal statement that the company would not undertake to deliver the message, if made, must go for nothing in the face of the undisputed facts which show that it did in reality, and according to its custom, undertake and agree by its Gordonsville agent to do it.

Had the message been delivered promptly, Brown would have had an election between coming to Nashville by such private conveyance as he might have been able to secure, or by the next westbound train, which was scheduled to pass Hickman at about 10 o'clock the next morning.

The Gordonsville agent testified that he supposed the train could be elected, and that for that reason he was not so prompt in delivering the message as he would otherwise have been.

In the course of his charge as to the measure of diligence to be exercised in delivering the message, the trial judge correctly said: "In this connection I will further instruct you, gentlemen, that the operator would have no right to speculate upon the question as to what conveyance Mr. Brown would take on his way home, or to determine the time of delivery of the message by the fact that the next railroad train did not pass until the next day."

⁶² Undoubtedly, it would have been for Brown alone to decide which of the two modes of conveyance he would adopt, and that being his exclusive right, it must obviously have been the duty of the messenger to exercise such reasonable diligence as would have left him to make that decision for himself at the earliest practicable time.

In another part of the charge the court said to the jury: "In order for the plaintiff to recover, he must show by a preponderance of the evidence: 1. That defendant's agent did not exercise reasonable diligence in delivering the message; and 2. That had it been delivered without unreasonable delay, the plaintiff, after receiving it, could by reasonable diligence have reached his home before his daughter's death."

The latter proposition is too narrow, in that it did not include the additional requirement that the jury should find that the plaintiff would have reached his home before the death of his daughter. That he could have done so is not sufficient. To fix liability on the company, it must appear both that the means of making the journey in so short a time could have been found, and that they would have been made available.

The practicability of such a fact does not necessarily imply that it would have been undertaken and accomplished. It may be that he could have performed the exploit, and yet would not have ⁶³ done so; and it matters not in this case that he could unless he would, since it is for the deprivation of seeing his daughter before she died that he sues.

To cure this omission in the general charge, the defendant's counsel submitted a special instruction, as follows: "Before you can find for the plaintiff you must believe from the evidence that he both could and would have driven the distance from Hickman to Nashville that night, and that he would have arrived in Nashville before his daughter died."

The court refused this instruction, and thereby repeated and emphasized the error in the general charge.

Since a new trial must be granted on account of this error in the charge and ruling of the court, it is not necessary to say more of the assignment against the judgment for alleged excessiveness than that five hundred dollars is regarded as a very full recovery.

Reverse and remand.

THE LAW OF THE TELEPHONE is the subject of the monographic note to *Central Union Tel. Co. v. Falley*, 10 Am. St. Rep. 128-136. Damages for failure to send or deliver telegrams are discussed in the monographic notes to *Western Union Tel. Co. v. Cooper*, 10 Am. St. Rep. 778-790; *Western Union Tel. Co. v. Luck*, 66 Am. St. Rep. 873-875.

WARFIELD v. RAILROAD.

[104 Tennessee, 74.]

CARRIERS—RIGHT TO EXPEL PASSENGER—NONPAYMENT OF FARE.—Failure of a passenger to pay the fare of a child under his care and control authorizes the expulsion of both, although both are minors.

WITNESSES—EVIDENCE TO SUPPORT CHARACTER.—If a witness is assailed on cross-examination by questions calculated to impeach his veracity and question his truthfulness, he may introduce evidence to sustain his general character.

TRIAL.—BURDEN OF PROOF is on plaintiff to establish by a preponderance of the evidence all material facts necessary to sustain and establish his case.

G. W. Sybert and J. B. Daniel, for the appellants.

Smith & Maddin, for the appellee.

78 WILKES, J. These actions were for unlawfully ejecting the plaintiffs from the cars of defendant road. They were tried together in the court below and in this court, and there was verdict and judgment in each case in the trial court for the railroad, and the plaintiffs have appealed and assigned errors. The facts, so far as necessary to be stated, are that plaintiff Willie is a negro girl some fifteen to seventeen years of age, and plaintiff Mary is also a negro girl about seven years of age.

They started from Nashville together to go to St. Bethlehem, by way of Guthrie. The girls were accompanied to the station by the mother of the plaintiff, Mary, who, it appears, bought a **78** ticket to St. Bethlehem for the older girl, and gave to her some money to pay the fare of the younger one, who had no ticket. When they attempted to get on the cars at Linck's Station, in Nashville, the conductor asked for their tickets. Mary's mother stated to him that the younger girl had no ticket, but had money to pay her fare, and the older girl stated that she had the money to pay the fare of the younger one. Upon their statements they were allowed to enter the cars. Soon after the car left the station the conductor asked for the fare of the younger girl. The elder one gave him all the money she had, and upon counting it the conductor found that there were only thirty-seven cents. He told her that half fare to Guthrie was seventy-five cents, and she must either pay that or both must get off at East Nashville. They were not ejected otherwise than by this statement of the conductor, but in obedience to

it both left the car at the East Nashville shops, a point within the city limits near a street-car line and a number of residences. They went to the house of a negro near by, and he carried them back to the home of the Harrington girl, which they reached by 11 o'clock in the morning. Three days later, having in the meantime bought a ticket for the younger one, both girls went over the road to their destination, under the same conductor as had the train in charge on the first occasion.

⁷⁷ The older girl was the aunt of the younger, and the latter was going to visit this aunt, who lived at St. Bethlehem. The older girl had some money to pay the fare of the younger and did all the talking to the conductor. The younger had no money or ticket and said nothing to the conductor. The older girl offered both her ticket and the money she had for the younger girl to the conductor, who declined to receive either. He was not present when they left the car, being engaged at another point on the train. There is some conflict of testimony as to the amount of money the older girl offered for the passage of the younger one, but the weight of the evidence is that she only had half enough to carry her to Guthrie, which was the end of the conductor's run. The jury, having passed upon the facts, it is evident that they found that the younger girl was in the custody of the older, and that the latter had only half enough money to pay her fare to Guthrie.

Several errors are assigned, but the real question of controversy in the case is whether the conductor had a right to put both girls off the train, because the younger one failed to pay her fare and it was not paid for her. The court charged the jury that they must determine whether the younger child was in charge and control of the older, and if so, and she failed to pay her fare, both might be ejected, and that the jury ⁷⁸ must determine how the facts were. It is said that the court should more specifically have defined what was meant by charge and control, in view of the facts of the case. We think the charge quite clear, and it could hardly have been aided by further statements, but if so, then additional instructions should have been asked upon the point: *Cumberland Tel. etc. Co. v. Poston*, 94 Tenn. 696. As to the proposition of law involved, we are of the opinion that the trial judge was correct.

In *Ray on Negligence of Passenger Carriers*, page 187, it is said: "The failure to pay the fare of a child under the care of a passenger will authorize the expulsion of the passenger":

Citing Philadelphia etc. R. R. Co. v. Hoefflich, 62 Md. 300, 50 Am. Rep. 223; Gibson v. East Tennessee etc. R. R. Co., 30 Fed. Rep. 904.

Hutchinson on Carriers, section 567c, says: "A person traveling with a child in his custody is liable for the payment of the child's fare, and he may be ejected with the child when he refuses to pay the fare of the latter": Citing Pittsburgh etc. Ry. Co. v. Dewin, 86 Ill. 296. The reason of the rule is apparent. The road is not required to carry the child unless its fare is paid, but it would be contrary to sound policy to expel the child and leave it alone.

If the passenger brings it aboard or has it in his custody, he becomes responsible for its fare, ⁷⁹ and the law implies a contract that he will pay it, and look after and protect the child.

It is said it was error to allow evidence to sustain the general character of the witness, Corbett, the conductor on the train. This witness was assailed in a severe and searching cross-examination by questions which, in their substance and manner of asking, were calculated to impeach his veracity and question his truthfulness. Under such circumstances it was proper to allow evidence to sustain his character: Richmond v. Richmond, 10 Yerg. 343-345.

The insistence of the counsel for plaintiffs that the older girl could not be ejected for failing to pay the younger one's fare unless she had expressly bound herself to become responsible therefor is not well taken. If the older one has the younger one in her charge and control, she is by law responsible for its fare, or liable to be ejected with the younger one for failure to pay the same, and it does not change the rule if both parties are minors.

It is said that it was error to charge that the burden of proof was upon the plaintiffs to establish by a preponderance of the evidence every allegation contained in this cause. We concede that this language is too broad, but are of the opinion that the jury construed it to mean that the plaintiffs must make out by proof every allegation necessary to establish their case.

⁸⁰ The defendant afterward asked the court to charge that the burden of proof was on the plaintiffs to establish by a preponderance of evidence all material facts necessary to sustain their case, and among them is the question whether or not Villie Warfield tendered sufficient money to pay the little girl's fare to Guthrie, and this was given.

We think that, taking these charges together, the jury could not have been misled, and that the latter lays down a correct rule of law. Upon the whole record we have not been able to find any reversible error, and the judgment of the court below is affirmed with costs.

CARRIERS.—THE EXPULSION OF PASSENGERS from railway trains for refusal to pay their fares is discussed in the monographic notes to Chicago etc. R. R. Co. v. Parks, 68 Am. Dec. 570-573; Commonwealth v. Power, 41 Am. Dec. 476-478. If a mother, with a stopover ticket, boards a train with her child and refuses to pay his fare, both may be ejected at the next station: Lake Shore etc. R. R. Co. v. Orndorff, 55 Ohio St. 589, 60 Am. St. Rep. 716.

WITNESS—VERACITY.—EVIDENCE TO SHOW the reputation of a witness for truth and veracity is admissible: State v. Burpee, 65 Vt. 1, 86 Am. St. Rep. 775.

BROWN v. ODILL.

[104 Tennessee, 250.]

MARRIAGE AND DIVORCE—MARRIAGE CONTRACT—BREACH OF.—A contract to marry upon the death of the divorced wife of one of the parties is not "void for indefiniteness and uncertainty."

MARRIAGE AND DIVORCE—MARRIAGE CONTRACT.—A contract between two persons to marry upon the death of the divorced wife of the man is neither void as being "in illegal restraint of marriage," nor as being "against public policy."

MARRIAGE AND DIVORCE—BREACH OF PROMISE.—A promise of marriage, whenever to be consummated, cannot validly subsist after one of the parties has intermarried with a third person.

MARRIAGE AND DIVORCE—BREACH OF PROMISE.—A promise of a man to marry a certain woman on the death of his divorced wife is effectually broken, so as to give an immediate cause of action by his conceded marriage to a third woman while his divorced wife still survives.

MARRIAGE AND DIVORCE—BREACH OF PROMISE—MEASURE OF DAMAGES.—Plaintiff is entitled to recover for a breach of promise of marriage such an amount as will compensate her for the injury received. The elements of such damages are her disappointment of reasonable expectations of social, domestic, and material advantages to be derived from the promised marriage, the injury to her prospects in life, the wounds to her affections, and her mental anguish and mortification resulting from the wrongful breach of the contract.

EVIDENCE.—OPINIONS OR CONCLUSIONS drawn from the statements of third persons, and not being those of an expert upon a proper subject for expert testimony, are inadmissible as original evidence for either party, and cannot be made the basis for impeaching a witness; but the answer in respect thereto, if permitted, is conclusive upon the party calling for it.

MARRIAGE AND DIVORCE—BREACH OF PROMISE—DAMAGES.—If the verdict for damages for a breach of a promise to marry is not so great as to indicate prejudice, passion, caprice, or corruption on the part of the jury, it cannot be set aside for excessiveness.

W. S. Fleming and Figuers & Padgett, for the appellant.

E. H. Hatcher and W. E. Greenlaw, for the appellee.

²⁵¹ CALDWELL, J. William Hugh Brown prosecutes this appeal in error from a judgment for two thousand eight hundred dollars, obtained against him by Miss Sarah Alberta Odill for the alleged breach of a contract of marriage.

The plaintiff averred in her declaration that on January 2, 1894, she and the defendant entered into a contract to marry each other on the eighteenth day of the same month and year; that before the latter day arrived, at the solicitation of the defendant, who had a divorced wife still living, and on account of religious scruples on his part ²⁵² they postponed the marriage until that divorced wife, whom he represented to be in very bad health and not long to live, should die; that during the continuation of their agreement to marry upon the death of his divorced wife, and while she still survived, the defendant, on December 19, 1897, married another woman and avowed that he would never marry the plaintiff.

The defendant assigned three grounds of demurrer: 1. That the contract averred "is void for indefiniteness and uncertainty"; 2. That it is void because "in restraint of marriage"; and 3. That it is void because "against public policy."

The circuit judge overruled the demurrer in toto, and his action in so doing is assigned as error.

This court deems no objection raised by the demurrer tenable in any particular. In the first place the contract as averred is entirely definite, and absolutely certain in every element and part, except as to the time of consummation, and that is reasonably definite and certain since it is made to depend upon an event which in the course of nature must inevitably occur. It is true that one or both of the contracting parties might die in advance of that event, but the same would be true if the marriage had been set for the first day of the next month, or of the next year; and in neither case would that possibility render the contract "void for indefiniteness and uncertainty."

²⁵³ In the next place the contract is in favor of marriage rather than in restraint of it. It bound the plaintiff and the

defendant mutually to marry each other. In that respect it was positive and absolute. Of course, its terms were intended to restrain her from marriage with any other man, and him from marriage with any other woman; but that is not restraint of marriage in the legal sense, otherwise there could be no lawful marriage contract between any man and woman, because it would restrain each of them from marrying some one else. Nor is it material in this aspect of the contract that it did not designate a particular or specific day for the performance of the marriage ceremony.

The third assignment of demurrer, though not specifying any reason for the assertion therein that the contract is "against public policy," was no doubt intended to advance the proposition that it was subject to that objection, because its ultimate consummation was by its terms made to depend upon and to follow the death of the defendant's divorced wife, and in that way to hold out an inducement to the destruction of her life.

At first view there is seeming force in the proposition; yet the court, after mature consideration, does not regard it as sound in law. There was in reality no legal impediment in the way of the marriage, and both parties were cognizant of that fact. Only "religious scruples" prevented ²⁵⁴ an immediate or early consummation, and it can hardly be conceived that persons actuated by so high a motive could be tempted to end the postponement by committing murder. The agreed delay, self-imposed and self-terminable at any moment, as it was, cannot properly be said to imply illegality of purpose or to afford an inducement to crime.

A promise of marriage, to be fulfilled on the death of the defendant's father, was recognized as a valid contract by Lord Chief Baron Kelly in the case of *Frost v. Knight*, L. R. 5 Ex. 322, and later by Lord Chief Justice Cockburn in the same case, reported in L. R. 7 Ex. 111.

A note in 4 *American and English Encyclopedia of Law*, second edition, page 889, refers to a case of same style as reported in L. J. 41 Ex. 78, and holding such a contract to be good.

The very much earlier case of *Woodhouse v. Shepley*, 2 Atk. 535, cited for the present defendant, is not in point here. There the woman, Hannah Woodhouse, and the man, Ralph Shepley, had become engaged to marry without the knowledge and over the opposition of her father, and executed each to the other a

bond in the penalty of six hundred dollars, and with condition that each should marry the other within thirteen months after the death of her father. When thirteen months after the death of the father had expired, the woman ²⁵⁵ filed her original bill to be relieved against her bond, and the man brought his cross-bill to enforce the penalty. In disposing of the case Lord Chancellor Hardwicke said: "I am, therefore, of opinion that on the original bill the plaintiff ought to be relieved; and I say the same in this case as Lord Cooper did in *Floyer v. Lawington*, 1 P. Wms. 268, that though none of these circumstances singly might be sufficient to overturn this bond, yet all together they are so; but the chief of these, and which has great weight with me, is the encouragement this might give to disobedience and the fraud on parents": *Woodhouse v. Shepley*, 2 Atk. 540. That was not a suit upon the marriage contract itself, as was the case of *Frost v. Knight*, L. R. 5 Ex. 322, nor was the supposed inducement to take the intervening life even suggested by Lord Hardwicke as one of the several circumstances upon which, as a whole, the judgment was rested.

After his demurrer had been overruled, the defendant filed pleas, in which he averred that the second agreement between the plaintiff and himself was a cancellation of their engagement, and not simply a postponement of the time for their marriage, as averred in the declaration.

The fact of the original marriage contract between these parties was conceded in the proof, as were the defendant's marriage to Dora Bunch, his present wife, and the continuing life of his divorced wife; and the principal controversy before ²⁵⁶ the jury was whether that contract had been actually canceled, as the defendant averred and testified, or only its fulfillment postponed, as the plaintiff averred and testified. There was no proof to sustain the averment of the declaration that the defendant had formally declared his purpose never to marry the plaintiff, nor that he had done or said anything that could be construed as a breach of the alleged contract to marry her upon the death of his divorced wife, unless his intermarriage with his present wife should be considered such a breach.

In a request for special instruction, as well as in his motion in arrest of judgment, the defendant advanced the proposition that the contract, if found to be that he had agreed to marry the plaintiff after the death of his divorced wife, was not breached by his marriage to Nora Bunch, and his present conjugal relations with her during the lifetime of that divorced

wife and while she still survives; and the court's refusal to give that instruction and grant that motion is made the ground of the next assignment of error.

The substance of the contention made for the defendant on this assignment is, that the time for the fulfillment of his alleged promise to marry the plaintiff has not yet arrived, because his divorced wife is still living, and that it cannot be foreseen, and should not be adjudged in advance of her death, that he will not, when that event ²⁵⁷ shall occur, have been released by death or otherwise from his alliance with his present wife, and then be ready to fulfill both the letter and spirit of the alleged contract with the plaintiff by intermarriage with her.

To say the least of it, the contention possesses the merit not only of novelty but of apparent plausibility as well. It is clear and incontrovertible that the time for the performance of the contract averred has not yet come, and it is possible that the defendant will be ready and able to perform it lawfully and according to its terms when that time does come.

It has been held that a testamentary provision for a son, to be born to either of two designated girls through her future marriage into either of two designated families, is not defeated, nor the gift over perfected by their marriage into other families, because it is possible, nevertheless, that one of them may yet marry into one of the designated families and have a son as the fruit of that marriage: *Randall v. Payne*, 1 B. C. C. 55, cited in 2 *Jarman on Wills*, Randolph and Talcott's ed., 511, 512.

But the possibility of the defendant's readiness and ability to marry the plaintiff, as she avers he agreed to do, upon the death of his divorced wife is not a sufficient answer in law to the averment that he breached that contract by marrying another person. His contract to marry the ²⁵⁸ plaintiff, as she averred and as the jury found, contemplated that he should marry no one else before her, and his marriage with another, though in advance of the time he was to marry the plaintiff, was in law a plain breach of that contract. It was in legal contemplation an unqualified renunciation of his contract with plaintiff, and absolutely terminated their engagement. He cannot occupy the relation of lawful husband to his present wife and at the same time defend this suit upon the ground that his previous promise to marry the plaintiff remains unbreached.

A promise of marriage, whenever to be consummated, cannot validly subsist after one of the parties has intermarried with a

third person. The two things are utterly inconsistent and antagonistic, and the courts will indulge no presumption in favor of a divorce or against the life of the preferred person for the purpose of discovering a possibility that the unfaithful one may yet be ready and able to marry the other person also when the deferred time shall arrive.

The defendant, in the same request for special instruction, properly conceded that a positive declaration on his part that he would never marry the plaintiff, if made, would have breached the contract averred by her, and afforded her a right of action thereunder, notwithstanding the fact that the time for fulfillment has not come; and yet such a declaration could not be a more effective ²⁵⁹ and conclusive renunciation of his promise than was his intermarriage with another person. Indeed, the possibility of readiness and ability to perform the contract at the appointed time (if that possibility were considered of any legal consequence, as it is not) is much greater in the former than in the latter condition; for it is more reasonable by far to suppose that a person, who has simply declared a purpose not to keep his promise of marriage to one woman, will relent and still offer to keep it, than it is to suppose that after marrying another he will by her death or divorce be released from the relation with her, and thereafter fulfill his promise with the former at the time previously designated.

In the English case of *Frost v. Knight*, L. R. 5 Ex. 322, already cited, it appeared that the parties contracted to marry each other upon the death of the man's father, and that before that event occurred the man declared that he would never marry the woman. Thereupon she sued him, while his father remained in life, averring that declaration as a breach of the contract.

She obtained a judgment in the lower court, but it was arrested in the court of exchequer by the opinion of Lord Chief Baron Kelly, upon the ground that the defendant's father had not died, and that the defendant might still marry the plaintiff upon the death of his father, notwithstanding ²⁶⁰ he had declared that he would never marry her: *Frost v. Knight*, L. R. 5 Ex. 322, 336.

The latter holding was reversed on writ of error, and the original judgment restored and affirmed by the opinion of Lord Chief Justice Cockburn, upon the ground that the defendant's declaration was an absolute breach of his contract, and gave the plaintiff an immediate right of action for damages:

Frost v. Knight, L. R. 7 Ex. 111. For a stronger reason would the marriage of the defendant to another person before the death of his father have been a renunciation and breach of his promise to the plaintiff, and afforded her an immediate right of action for appropriate damages.

It results, therefore, that the trial judge ruled rightly in refusing to instruct the jury that the marriage of the defendant to his present wife in the lifetime of his divorced wife could not be a breach of his alleged promise to marry the plaintiff when his divorced wife should die, and in refusing to arrest the judgment upon the ground that the divorced wife is still living.

The charge delivered correctly announced the proposition that the promise of the defendant to marry the plaintiff on the death of his divorced wife, if made as averred by the plaintiff, was effectually broken by his conceded marriage to another woman, though that divorced wife still survived.

The assignments against the court's declination ²⁶¹ to grant requests for special instruction relative to the burden of proof and the measure of damages are sufficiently answered by the statement that the general charge delivered was accurate and amply full on those subjects. When the two parts of the charge bearing upon the former subject are considered together, as the universal rule of practice requires they should be, it is unmistakably clear that the jury was therein told that the burden was upon the plaintiff to show by a preponderance of the evidence that the time for the marriage between her and the defendant was postponed by mutual consent until after the death of his divorced wife; and such was the effect of the special instruction requested on that subject. The charge as to the measure of damages enumerated only the proper elements of compensatory damages in such a case, and directed that if the jury should find for the plaintiff, it should "assess her damages at such an amount as will compensate her for the injuries received."

This part of the charge was self-restrictive, and it plainly limited the consideration of the jury to the elements of compensatory damages, and precluded the inclusion of exemplary damages; hence, it would have been superfluous to have charged additionally, as requested, that the "plaintiff would be entitled to only compensatory and not exemplary damages."

When the engagement between these parties was ²⁶² first made, and the time for the consummation fixed at a future day

in the same month, the plaintiff's parents were called into the parlor and the matter laid before them for their approval, which they gave. Neither of them was present, however, when the plan was changed and the second agreement entered into, the mother being in another room of the house, and the father having just gone to service at the church, of which all of them were exemplary members.

After the plaintiff had testified before the jury, her father was examined as a witness in her behalf. In his testimony in chief he stated the facts just recited and some others, the most material of the latter being that the defendant told him, about three weeks after the change of plan, that the marriage had been postponed by mutual agreement between himself and the plaintiff. On cross-examination he was asked if he did not know that the engagement was broken off by mutual consent, and he replied that he did not, but that he learned from his "family," from the defendant, and "indirectly" from the plaintiff that the marriage had been postponed.

He was further asked if he did not, a few days after the alleged postponement, visit their pastor, and then tell him that the engagement had been broken off.

Upon the plaintiff's insistence that the question was immaterial and incompetent, and that the defendant ²⁶³ would be bound by the answer, and could not be allowed to contradict it, the court refused to permit the witness to answer in the presence of the jury. He did answer in the absence of the jury, however, that he did not tell the pastor that the marriage "had been broken off," but did tell him "that the case had been continued." In the further progress of the trial the defendant put the pastor on the stand, and offered his testimony to the effect that the plaintiff's father did tell him complainingly, at the time and place mentioned, that he, the pastor, had "broken up the marriage"; but the offer was refused on the objection of the plaintiff.

The defendant insists that the question put to the plaintiff's father was competent as laying proper ground for impeachment, and that his answer and its contradiction by the pastor should have been allowed to go to the jury; and the court's ruling to the contrary is assigned as error.

The ruling was obviously correct. The plaintiff's father had testified that he had never at any time heard her say whether the marriage had been broken off or only postponed, but that

he had learned from her "indirectly," and from the other members of his "family," that it had been postponed. He had no other source of information on the subject, and knew nothing about it at the time of the interview with the pastor except what he had so learned by hearsay, his ²⁶⁴ conversation with the defendant, in which the latter was said to have stated that a postponement was made, not having occurred for a week or two after that interview.

It is manifest, therefore, that whatever the plaintiff's father may have said to the pastor at the time and on the subject mentioned in the question, could at most have been only the expression of his opinion or conclusion from what he had heard third parties say; that such an opinion or conclusion not being that of an expert upon a proper subject for expert testimony, was collateral to the real issue, and inadmissible as original evidence for either party; and that, being so, it could not properly be made the basis for impeaching the witness, but his answer in respect thereto, if permitted, would have been conclusive upon the defendant who called for it: *Saunders v. City etc. R. R. Co.*, 99 Tenn. 131, and citations.

For the same and kindred reasons other like rulings as to the testimony of the same and other witnesses, including the plaintiff's mother, are likewise approved, and the assignments against them held not to be good.

The assignment that "there is no credible proof to sustain the verdict" is bad in form, because it is the exclusive province of the jury to pass upon the credibility of witnesses; and it is not sustainable in fact with the word "credible" disregarded, ²⁶⁵ because there is not only some evidence to support the verdict, as required by the rule, but there is much evidence in its favor, the plaintiff having testified positively and consistently to the postponement of the marriage as averred in the declaration, and to several subsequent facts indicating a continuance of the engagement, and other witnesses having corroborated her testimony in regard to those subsequent facts.

The final objection is that the verdict, being for two thousand eight hundred dollars, is excessive.

There is no circumstance of aggravation in the case. Both parties were of excellent character and standing when they became engaged, and they are still so.

At that time the defendant told the plaintiff that his estate was worth ten thousand dollars, and it was so reported in the

neighborhood, but he now says that he was mistaken in his estimate, and that in fact he was then, and is now, worth much less than that. She seems to have no estate of her own, and her father is in very humble circumstances.

Among the principal elements of damage rightly to be considered by the jury in making up the amount of the verdict, after that point had been reached, were the disappointment of the plaintiff's reasonable expectations of social, domestic, and material advantage to be derived from the promised marriage, the injury to her prospects in life, the ²⁶⁶ wounds to her affections, her mental anguish and mortification, resulting from the defendant's wrongful breach of the contract. When all of these are taken into account, this court cannot say that the amount of the verdict is too great. Certainly, it is not so large as to indicate prejudice, passion, caprice, or corruption on the part of the jury, and not being of that magnitude, it cannot be set aside for excessiveness: *Goodal v. Thurman*, 1 Head, 216; *Tennessee etc. R. R. Co. v. Roddy*, 85 Tenn. 400; *Jenkins v. Jenkins*, 98 Tenn. 545.

Let the judgment be affirmed.

BREACH OF PROMISE TO MARRY.—A promise of marriage by a divorced man prohibited by the decree of divorce from remarrying in the lifetime of the divorced wife is void, and no action will lie thereon: See the monographic note to *Burnham v. Cornwell*, 63 Am. Dec. 536. Defenses in actions for breach of promise are treated in the monographic note to *Shackleford v. Hamilton*, 40 Am. St. Rep. 172-176.

BREACH OF PROMISE—ELEMENTS OF DAMAGES.—In estimating the plaintiff's damages in an action for breach of promise to marry, the jury are not to be confined to mere pecuniary or worldly considerations, but it is their duty to take into consideration the injury to the plaintiff's feelings, affections, and wounded pride, and the pain and mortification resulting from the breach of the contract: See the monographic note to *Burnham v. Cornwell*, 63 Am. Dec. 545; *Daggett v. Wallace*, 75 Tex. 352, 16 Am. St. Rep. 908.

BREACH OF PROMISE—EXCESSIVE DAMAGES.—A verdict in an action for breach of promise to marry will not be set aside on the ground that the damages are excessive, unless they are so excessive as to make a case of indubitable wrong so clear and striking as to indicate prejudice, undue sympathy, or corruption: See the monographic note to *Burnham v. Cornwell*, 63 Am. Dec. 546; *Daggett v. Wallace*, 75 Tex. 352, 16 Am. St. Rep. 908.

GARDNER v. GARDNER.

[104 Tennessee, 410.]

MARRIAGE AND DIVORCE.—Cruelty, as cause for divorce is not confined to acts of personal violence, but includes such treatment as endangers health and renders cohabitation intolerable.

MARRIAGE AND DIVORCE—CRUELTY—EXCESSIVE INTERCOURSE.—A gross abuse by the husband of his marital rights, such as to compel his wife, a woman of delicate health, by threats, to submit to incessant and abnormal sexual intercourse, to the serious impairment of her health, is such cruelty as is ground for divorce.

MARRIAGE AND DIVORCE—CRUELTY—PARTIES AS WITNESSES.—Husband and wife are competent witnesses in divorce proceedings, and may testify in respect to any acts of cruelty offered the one by the other.

MARRIAGE AND DIVORCE—CRUELTY.—In an action for divorce founded on cruelty as the cause therefor, admissions or conversations by a husband relating to the treatment of his wife are admissible in evidence against him.

T. K. Reynolds, for the appellant.

⁴¹¹ McALISTER, J. This is a bill for divorce preferred in the chancery court of Weakley county in which Susan Gardner seeks a dissolution of the bonds of matrimony upon the ground of cruel and inhuman treatment on the part of her husband. The specifications of the bill are that the defendant is a man of inordinate lust, and by threats has compelled complainant to submit to abnormal sexual intercourse. Complainant alleges that she is a delicate woman, and this fact was known to defendant at the time of their marriage, and that her health has been seriously impaired by said cruel and inhuman treatment. That complainant finally refused to submit to such excessive indulgence, whereupon the defendant threatened her life, and thereby forced her to withdraw from his dominion and control. The chancellor on the hearing refused to permit complainant to testify to the treatment of her husband in forcing her to submit to such immoderate sexual intercourse, upon the ground that such an inquiry would be against public policy. The court also refused to permit another witness to prove conversations had with the defendant husband on the subject. Complainant excepted to the ruling of the chancellor, and presented the objection by bill of exceptions showing ⁴¹² that this proof would have been made if the witness had been permitted to testify. The chancellor upon final hearing dismissed the bill. Complainant appealed.

The first assignment of error is that the court erred in refusing to permit complainant to testify in respect of the course of treatment inflicted upon her by the defendant.

This assignment is well taken. It is now well settled by this court that cruel and inhuman treatment within the meaning of the statute is not confined to acts of personal violence, but includes such treatment as endangers the wife's health and renders cohabitation intolerable.

In 5 American and English Encyclopedia of Law, old edition, page 799, it is said: "Cruelty as a cause of divorce is the willful, persistent causing of unnecessary suffering, whether in realization or apprehension, whether of body or mind, in such a way as to render cohabitation dangerous and unendurable."

On page 794, same work, it is said, viz.: "But excessive intercourse may be cruelty, or intercourse where the wife's health is delicate." In *English v. English*, 27 N. J. Eq. 71, a decree of divorce from bed and board was made on the ground of extreme cruelty, consisting mainly in gross abuse by the husband of his marital rights: *McMahon v. McMahon*, 186 Pa. St. 485. "A divorce will be granted to a wife under parliamentary acts, where the common laws of nature⁴¹³ and decency have been outraged by the husband in compelling his wife to submit to incessant and abnormal sexual intercourse which has prostrated her nervous system, and, if persisted in, will endanger her life": *Marks v. Marks*, 62 Minn. 212.

The chancellor was in error in refusing to permit the wife to testify on this subject. The practice is now well settled by this court that husband and wife are competent witnesses in divorce proceedings, and may testify in respect of any acts of cruelty offered the one by the other: *Malone v. Malone*, Knoxville, September Term, 1898.

The chancellor was also in error in excluding the testimony of Eliza Hodges in reference to the conversation she had with defendant respecting his treatment of complainant.

It results that the decree is reversed and the cause remanded.

DIVORCE.—TO CONSTITUTE CRUELTY as a ground for divorce, actual violence is not necessary: See the monographic note to *Reinhard v. Reinhard*, 65 Am. St. Rep. 75.

DIVORCE.—EXCESSIVE SEXUAL INTERCOURSE demanded and persisted in by a husband may amount to cruelty entitling the wife to a divorce: See the monographic note to *Reinhard v. Reinhard*, 65 Am. St. Rep. 79.

WITNESSES.—ON HUSBAND AND WIFE AS WITNESSES, see the notes to *Hitchcock v. Moore*, 14 Am. St. Rep. 481; *State v. Boyd*, 27 Am. Dec. 377-381.

RAILROAD v. WYATT.

[104 Tennessee, 432.]

RAILROADS—EVIDENCE OF REPAIR OF DEFECTIVE PREMISES.—In an action against a railroad company to recover for injury caused by a defect in a depot platform, evidence that the platform was repaired and the defect removed after the accident happened is not admissible on the part of the plaintiff.

APPELLATE PRACTICE.—ADMISSION OF INCOMPETENT EVIDENCE resulting in no injustice, injury, or prejudice is not reversible error.

RAILROADS—DEFECTIVE PREMISES—EVIDENCE.—In an action against a railroad company to recover for injury caused by a defect in a depot platform, under a declaration fully alleging the defective condition of the premises, proof of patent defects in a platform in the neighborhood of the one causing the injury and existing for a considerable time before the accident is admissible to show that the railroad company had notice of the defective condition of its platform.

J. P. Rhodes and W. I. McFarland, for the appellant.

E. Smith and Harwood & Tyree, for the appellee.

⁴³³ **BEARD, J.** The defendant in error, while unloading cotton from his wagon to the platform of the plaintiff in error, placed one foot on the projecting end of a plank which formed a part of the platform. The pressure of the foot loosened the nail which had been driven to hold the inside end to the sleeper on which it rested, when it flew up and precipitated him to the ground, inflicting upon him injuries, to recover damages for which this suit was brought. The litigation resulted in a verdict for seven hundred and fifty dollars against the railroad, on which judgment was rendered by the court below. From this an appeal in the nature of a writ of error has been prosecuted.

In the progress of the cause the plaintiff below, over the objection of the railroad company, was permitted to show, by the testimony of two witnesses, that subsequent to the accident the company made extensive repairs to this platform. This action of the trial judge is assigned for error. In this there was error. While there has been some difference of opinion on this question, it is now settled upon what we deem sound reason, and certainly by the overwhelming weight of judicial opinion, that such testimony is incompetent ⁴³⁴ because the making of such repairs as would serve to secure the owner against claims for damages for future casualties is not to be construed into an admission of antecedent negligence, and evidence thereof is cal-

culated to divert the jury from the real issue and create prejudice against the defendant. To permit such testimony to be given would be, in effect, to place the owner in the embarrassing attitude of being compelled to choose between the risk of another accident by maintaining the status quo, or by repairing and making evidence against himself which would act prejudicially to his defense in the minds of the jury. This should not be tolerated: *Columbia etc. R. R. Co. v. Hawthorne*, 144 U. S. 202; *Colorado Electric Co. v. Lubbers*, 11 Colo. 505, 7 Am. St. Rep. 255; *Nalley v. Hartford Carpet Co.*, 51 Conn. 524, 50 Am. Rep. 47; *Terre Haute etc. R. R. Co. v. Clem*, 123 Ind. 15, 18 Am. St. Rep. 303; *Shinner v. Proprietors etc.*, 154 Mass. 168, 26 Am. St. Rep. 226; *Morse v. Minneapolis etc. Ry. Co.*, 30 Minn. 465; *Corcoran v. Peekskill*, 108 N. Y. 151; *Missouri Pac. Ry. Co. v. Hennessey*, 75 Tex. 155; *Hodges v. Percival*, 132 Ill. 53. To the same effect are one or two cases heretofore determined by this court.

But while the action of the trial judge in this regard was erroneous, yet it does not constitute ⁴³⁵ a reversible error. It would have been otherwise, if the evidence on the question of the unsoundness of the platform when the accident occurred had been debatable; for then this incompetent testimony might have turned the scale against the railroad company. But there was no room for debate on this point. The evidence was all one way as to it. The testimony of the witnesses of the plaintiff below that this plank, the tilting of which caused the accident, rested upon a sleeper so rotten that it would not hold the nail, was uncontradicted. Such being the state of the record, it is evident no injustice resulted from the admission of this incompetent testimony.

2. It is insisted that there was error in permitting evidence to go to the jury as to the unsound condition of this platform elsewhere than at the point where the accident occurred. This testimony was confined to patent defects that were in its immediate neighborhood, and which had existed for a considerable period of time prior to the accident. The declaration did not limit the complaint of the plaintiff below to the condition of the particular plank the defective condition of which occasioned the injury, but averred "that said platform, long prior to plaintiff's said injury and fall, had been out of repair; the sleepers and sills had rotted, and many of the platform planks had decayed in places, causing holes in the same, as was well known

to the defendant ⁴³⁸ long before the injury," etc. Under this declaration this testimony was competent, as tending to show that the defendants were put on notice and yet had failed to exercise proper diligence in seeing to it that its platform (including the plank occasioning the injury) to which it invited the shipping public was in a safe condition: *Vicksburg etc. R. R. Co. v. Putnam*, 118 U. S. 545; 4 *Elliott on Railroads*, sec. 1641.

The other errors assigned are disposed of orally.

The judgment of the circuit court is affirmed.

NEGLIGENCE.—EVIDENCE OF REPAIRS made after an injury has been sustained is incompetent to show antecedent negligence on the part of a railroad company: *Terre Haute etc. R. R. Co. v. Clem*, 123 Ind. 15, 18 Am. St. Rep. 303. See, further, the monographic notes to *St. Louis etc. Ry. Co. v. Weaver*, 57 Am. Rep. 183-187; *Terre Haute etc. R. R. Co. v. Clem*, 18 Am. St. Rep. 307-310.

TORILLA v. ALEXANDER.

[104 Tennessee, 453.]

JUDGMENTS—JUSTICE OF PEACE.—A justice's judgment for a definite sum and costs is valid, and, though the words "subject to all credits, if any," are added thereto, they may be rejected as surplusage.

JUDGMENTS.—JUSTICE OF PEACE has the same right and power to correct his judgments as courts of record have.

Sloan & Greer, for the appellant.

Carter & England, for the appellee.

⁴⁵⁴ **WILKES, J.** This is a suit upon a note, commenced before a justice of the peace. On the fourth day of April, 1898, there was a judgment in favor of the plaintiff and against the defendant for one hundred and thirty-one dollars and sixty-one cents and costs. The judgment was regularly entered upon the docket, but the justice made the following indorsement on the warrant:

"Judgment for the plaintiff against the defendant for one hundred and thirty-six dollars and sixty-one cents, subject to all credits, if any, and cost of suit and interest at the rate of six per cent, for which execution may issue.

"This the fourth day of April, 1898.

"T. L. LANGLEY, J. P."

In November thereafter the plaintiff gave notice that he would move the justice to correct the indorsement on the warrant, and in pursuance of this notice the justice made the following additional entry:

"In this case the plaintiff moved the court to correct the judgment heretofore rendered on the fourth day of April, 1898, so as to conform to the judgment entered on the docket, and it appearing that notice has been given as required by law, said [notice?] motion is sustained; and it appearing that in writing the judgment on the warrant in said case on the fourth day of April, 1898, that said judgment is not a finality, and for sufficient cause I set aside said judgment and give judgment in favor of plaintiff and against ⁴⁵⁵ defendant for one hundred and thirty-one dollars and sixty-one cents and interest and cost of suit, this being same as entered on my docket on the fourth day of April, 1898; on the day of rendition of former judgment.

"This the twenty-sixth day of November, 1898.

"T. L. LANGLEY, J. P."

From this action of the justice of the peace the defendant appealed to the circuit court, and in that court moved to quash the proceedings of the justice as void. The court sustained the motion and quashed the proceedings, and the plaintiff appealed and assigned as error this action of the trial judge in the court below.

We are of opinion there is error in the action of the circuit judge.

The judgment of the justice was valid. The words in the indorsement upon the warrant, "subject to all credits, if any," were mere surplusage, and did not prevent the judgment from being certain and final, and they might have been so treated by the justice of the peace.

But the plaintiff had the right to have this entry corrected so as to conform to the actual facts and show a judgment definite and final. A justice of the peace has the same right and power to correct his judgments as courts of record have, upon five days' notice being given: Shannon's Code, sec. 4600.

The evident object and purpose of the justice ⁴⁵⁶ was to expunge from his entry upon the warrant the words "subject to all credits, if any," so as to leave the entry in the shape of an unconditional judgment, and the trial judge should have so treated it.

In the case of *Womack v. Walling*, 1 Baxt. 425, the court held that a justice could amend his judgment by striking out the words "to be discharged in Tennessee and Kentucky bank notes," which followed after the judgment. In *Fanning v. Fly*, 2 Cold. 489, it is held in substance that under section 4598 of Shannon's compilation, if a judgment entry contain every requisite to make it valid and in form sufficient to make it answer the writ and declaration, objectionable words that add nothing to the force of the judgment, and when excluded altogether in no degree diminish its operation or effect, may be rejected by the court trying the cause after verdict and judgment or in the revising court on appeal.

In the same way words added to a judgment which are contrary to it and can have no effect but to nullify it if given any force may be rejected as surplusage, in order that the judgment may have force and effect as intended. Too much formality should not be required of justices' entries and judgments, but every reasonable intendment in favor of their validity and sufficiency should be indulged.

⁴⁵⁷ We are of opinion the trial judge in the court below should have treated the entry of the justice upon his warrant as corrected so as to show an unconditional judgment for a definite and certain amount, and should have dismissed the defendant's appeal and ordered a procedendo to the justice to proceed upon the judgment as corrected. And this court, proceeding to render the judgment which the court below should have rendered, reverses the action of the trial judge, and procedendo will issue to the justice of the peace to issue execution for the amount of the judgment rendered by him, to wit, one hundred and thirty-one dollars and sixty-one cents and interest from the fourth day of April, 1898, and the costs of the original judgment, and for such further action as may be required to realize said judgment. The costs of this court and the circuit court will be paid by the defendant, W. S. Alexander, for which execution will issue from this court.

It is said that the record does not show that all the evidence is embraced in it. This is not a case for the application of this rule. The cause was not tried upon proof, but upon motion based upon the papers and entries before the justice of the peace, which were produced and relied on by the defendant as the basis of his motion.

JUSTICE'S JUDGMENT—FORM OF.—The record of a justice of the peace should not be scrutinized with severity, and the judgment of a justice's court is not expected to be in perfect form. Matters of form, in such judgment, are to be overlooked: See the note to *Davis v. Tramp*, 64 Am. St. Rep. 853; *State v. Myers*, 70 Minn. 179, 68 Am. St. Rep. 521.

CROY v. OBION COUNTY.

[104 Tennessee, 525.]

INTERSTATE COMMERCE—AGENCY.—If a person, after obtaining orders for goods from resident customers, submits such orders in his own name to a nonresident manufacturer, and obtains the goods which are charged to him individually, shipped to him directly in a single package, which is broken by him, and the goods delivered to the several customers and the price collected by him, the transaction is not one of interstate commerce exempt from a state license or privilege tax, and he sells the goods as owner, and not as an agent.

J. M. Ownby, for the appellant.

G. W. Pickle, attorney general, and C. N. Lannom, for the appellee.

525 CALDWELL, J. This is an action of replevin, brought by Frank O. Croy against W. W. Epperson, a constable of Obion county, to recover the possession of certain floor-sweeping broom brushes, which the latter had seized as the property of the former under a distress warrant issued for the collection of a tax for the privilege of selling articles of that kind in that county.

The circuit judge tried the case without a jury and rendered judgment in favor of the defendant, and from that judgment the plaintiff prosecutes an appeal in error.

The plaintiff rests his claim to relief upon the contention that he was engaged exclusively in interstate commerce, and, consequently, that he was protected by the commerce clause of the federal constitution from state taxation upon his business.

Only one witness was examined on the trial, and that was the plaintiff, who testified in his own behalf. He admitted that he had sold numerous articles like those involved in this case to different citizens of Obion county, Tennessee, and that he had paid no tax for the privilege of so doing. He said that he made the sales by sample and as agent of a firm that manufactured

the brushes at Sedalia, Missouri; that he went from house to house and took "orders," which "were just memoranda of names and addresses of parties who agreed to buy the brushes"; that at his convenience he, in his own name, and without giving the name of any customer, sent an order for "forty-six brushes and handles" to one of his principal's distributing agents at Paducah, Kentucky; that his order was there filled, and all of the articles shipped to him, in his own name, as an individual at Union City, in a single box; that he opened the box, took out the brushes, and delivered them one by one, indiscriminately, at the houses of those who had agreed to buy, all the brushes being alike and no one of them having been ordered or shipped for any particular purchaser.

The testimony thus delivered fails to disclose transactions in interstate commerce in the legal sense. The statement that the plaintiff was acting as the agent of a nonresident principal, as in *Hurford v. State*, 91 Tenn. 669, and *State v. Scott*, 98 Tenn. 254, is discredited, and the plaintiff shown to have been engaged in interstate commerce in his own behalf, as in *Kimmell v. State*, 104 Tenn. 184, by his narration of the manner in which he ordered, received, sold, and delivered the brushes. He did not communicate the names of his customers to his alleged principal, nor take any order from them to that principal, but only took ⁵²⁸ memoranda of their addresses for his own use; he ordered nothing in the name of any customer, but everything in his own individual name, and in that name alone the shipment was made; he ordered no particular article for any particular customer, but all of them, as a whole, for himself, and with a view to an indiscriminate delivery to his customers, one by one, as he might go to their houses. All these are characteristics of a business done for one's self, rather than of a business conducted by an agent for a principal.

Furthermore, if the plaintiff had, in fact and in good faith, made all of these transactions and done all of these things as agent of a nonresident principal, he would nevertheless have been without the protection of the commerce clause of the federal constitution and subject to taxation by the state, because the sales were not of original packages, but of distinct parts of an original package after it had been broken, and they, by force of law, had become parts of the general property within the state: *Kimmell v. State*, 104 Tenn. 184; *Austin v. State*, 101 Tenn. 563, 70 Am. St. Rep. 703.

For the two reasons stated the judgment of the circuit court is affirmed. No opinion is expressed as to the right of the plaintiff to test his liability for this tax by an action of replevin.

In the case of *Kimmell v. State*, 104 Tenn. 184, referred to in the principal case, it appeared that a person purporting to act as agent for a nonresident principal sold goods by sample to resident customers, forwarded his orders to the main house or firm in another state, though there was a branch house within the state, had the goods consigned, billed, and charged to him, individually, without disclosing who were the purchasers, and upon the receipt of the goods in a single package broke it open and delivered the goods to the different customers or purchasers, collecting the price therefor, and it was held that the transaction did not constitute interstate commerce, exempting the agent from the payment of a state license or privilege tax, and that he sold the goods, not as an agent, but as the owner.

INTERSTATE COMMERCE.—The sale of goods which are in another state at the time of sale, for the purpose of introducing them into the state where the sale is made, is interstate commerce: *State v. Emert*, 103 Mo. 241, 23 Am. St. Rep. 874; *Bloomington v. Bourland*, 137 Ill. 534, 31 Am. St. Rep. 382. Interstate commerce is the subject of the monographic note to *People v. Wemple*, 27 Am. St. Rep. 547-568.

RAILROAD v. CABINET COMPANY.

[104 Tennessee, 568.]

CARRIERS—NEGLIGENT DELAY—MEASURE OF DAMAGES.—A carrier requested to ship promptly, and notified that the goods are designed to fill a "penalty contract," is liable for such special damages to the shipper as arise from negligent delay in the transportation and delivery of the goods.

CARRIERS—NEGLIGENT DELAY—MEASURE OF DAMAGES.—If property is shipped to market for general sale to such purchasers as may be obtained, and the carrier unreasonably and negligently delays the transportation, the measure of damages is the depreciation in the salable quality and market value of the property at the place of destination between the time when it should have arrived and when it did in fact arrive.

CARRIERS—NEGLIGENT DELAY—MEASURE OF DAMAGES.—If property is sold at an advantageous price before shipment, on condition that it be delivered by a certain time, and the carrier, with knowledge of that fact, undertakes the transportation, and, through negligence, fails to make the delivery in time, and the conditional purchaser declines to receive the property on account of the delay, the liability of the carrier is measured by the difference between the market value of the property when it arrived at its destination and the price at which it was conditionally sold before shipment.

CARRIERS—NEGLIGENT DELAY—MEASURE OF DAMAGES.—If the intended use and application of the goods to be car-

ried are expressly brought to the carrier's notice at the time they are received, or could be reasonably inferred from known circumstances, so that the special use or application may be fairly considered to be within the contemplation of both parties, the consignor is entitled to recover the damages naturally resulting from his being unable to use or apply the goods owing to the negligent delay of the carrier in transporting and delivering them.

CONTRACTS—PENALTY—LIQUIDATED DAMAGES.—If a contract is for a matter of uncertain value, and a reasonable sum is fixed by the parties as the amount to be paid on a breach, that sum, though called a penalty in the instrument, is recoverable as liquidated damage if the obligation is not in fact performed. If, however, the sum named is not reasonable, it must be treated as a penalty and its enforcement refused.

CARRIERS—NEGLIGENT DELAY—DAMAGES — INTEREST.—A judgment for damages against a carrier for negligent delay in the shipment of goods does not bear interest as matter of law.

C. C. Bond, for the appellant.

Hays & Biggs, for the appellee.

MR. CALDWELL, J. This is an action of damages by a shipper against a common carrier.

On the 26th of February, 1898, the Southern Seating and Cabinet Company, of Jackson, Tennessee, entered into a contract with W. A. R. Goodwin, rector, to manufacture and put up certain pews in St. John's Episcopal Church, at Petersburg, Virginia, for the sum of five hundred and twenty-four dollars. The contract contained a ⁵⁷⁰ provision that the company "shall forfeit ten dollars per day for every day it fails to have pews in place after May 6, 1898," but that provision was subsequently so changed as to waive the forfeiture if the pews should arrive at Petersburg by the third day of that month.

The pews were manufactured and by the contracting company delivered to the Illinois Central Railroad Company, at Jackson, Tennessee, on the 20th of April, 1898, for shipment to the purchaser at Petersburg, Virginia.

The representative of the manufacturing and selling company at the time of delivering the pews for transportation said to the railway agent: "I wish you would forward this car as quick as you can; this is a penalty contract." The railway agent expressed assent to the request, and promptly executed a bill of lading, properly stating the name of the consignee and the destination of the pews. Nevertheless, the car remained in Jackson two days after the issuance of the bill of lading, and, when it left, the waybill, through some inexcusable mistake of the railway agent, called for Parkersburg, West Virginia, as the

destination of the pews. The car reached the latter point on the 27th of April, and there remained until the 13th of May, when, by direction of the defaulting carrier, it was started to Petersburg, Virginia, its true destination, where it arrived ⁵⁷¹ on the 21st of May—twenty-four days later than it would probably have arrived but for the misdirection in the waybill, and eighteen days after the contract limit for arrival of the pews had expired.

The purchaser accepted the pews, but in doing so required a deduction of one hundred and eighty dollars from the contract price, and paid only the balance of three hundred and forty-four dollars. He says he deducted that sum, not upon the mere ground that he had the right to do so under the forfeiture clause of the contract, but because he considered it "just compensation" for the inconvenience and expense resulting from the delay, and for the damage done to the pews in the transportation, and that he would not have received the pews in their damaged condition and after he had suffered the inconvenience and expense of the delay without that deduction from the contract price.

In December, 1898, the Southern Seating and Cabinet Company commenced this action against the Illinois Central Railroad Company before a justice of the peace, whose warrant stated the nature and ground of suit as follows: "For damages caused by the delay in shipping and delivering certain goods consigned by the plaintiff to W. A. R. Goodwin, Petersburg, Virginia, April 20, 1898, on account of which delay the said goods were damaged and the plaintiff damaged in the sum ⁵⁷² of one hundred and eighty dollars, forfeited by it under its contract for the delivery of said goods, of which the defendant had notice."

The justice of the peace pronounced judgment in favor of the plaintiff, and the defendant appealed to the circuit court, where verdict and judgment were rendered for the plaintiff for one hundred and eighty dollars, with interest. From the latter judgment the railway company has appealed in error to this court, and here assigned several objections to the proceedings below, on account of which a reversal and new trial are sought.

In the course of his charge the trial judge instructed the jury as follows: "If the goods were shipped and it was the fault of the railroad company in making a misdirection or misshipment that caused the delay after the third day of May, 1898, and if

the plaintiff in this case, through its agents and representatives, notified Mr. Reavis or Colonel Dinkins, or both of them, and they were representatives of the railroad company in receiving and shipping the goods, that it was a forfeit contract, that it was a penalty contract, and they received it with the knowledge that there was a penalty attached to the contract, then it would have been the duty of the railroad company to have shipped the goods, and if it accepted them that way, and was guilty of negligence in not getting them to Petersburg ⁵⁷³ in the time stated in the contract, and it had ample time to have done so, then it would be liable for the damages the plaintiff has sustained because of the penalty contained in the contract. Now, the burden of proof is upon the plaintiff to show that the railroad employes did receive the goods for the purpose of shipping them, had notice of the penalty, and it was a penalty contract; if it did have notice of the penalty contract, and the goods were accepted by it to be shipped, and it was the fault of the railroad company that they were not delivered by that date, to wit, the third day of May, 1898, the railroad company would be responsible for the penalty of the contract for the time the goods were not delivered, if the delay was caused by the fault of the railroad company."

The first assignment of error is directed against that instruction, the point of the objection being that it makes the loss sustained by the plaintiff under the penalty clause of its contract with Goodwin, and not the actual injury and depreciation of the pews by the delay, the measure of the defendant's liability.

Compensation is the primary principle underlying the law of damages; and where one of two contracting parties breaches his obligation, he is ordinarily liable to the other party, according to the nature and purpose of the contract, for all ⁵⁷⁴ loss suffered by him as the natural consequence of the breach.

In the case of *Hadley v. Baxendale*, 9 Ex. 341, where a carrier was sued in damages for negligent delay in the transportation of a mill shaft, the court, referring to the rule for the admeasurement of damages, said: "Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect to such breach should be either such as may fairly and reasonably be considered as arising naturally (i. e., according to the usual course of things) from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties at

the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation ⁵⁷⁵ the amount of injury which would arise generally, and in the great multitude of cases not by any special circumstances from such a breach of contract."

This rule has been adopted in cases too numerous to mention at this time. It was quoted approvingly by this court in *McDonald v. Unaka Timber Co.*, 88 Tenn. 43.

Where property is shipped to market for general sale to such purchasers as may be obtained, and the carrier unreasonably and negligently delays the transportation, the measure of damages for that default is the depreciation in salable quality and market value of the property at the place of destination between the time when it should have arrived and when it did in fact arrive: *East Tennessee etc. R. R. Co. v. Hale*, 85 Tenn. 69; *Hutchinson on Carriers*, sec. 771; 3 *Wood's Railway Law*, 1607; but if the property is sold at an advantageous price before shipment, on condition that it be delivered within a certain time, and the carrier, with knowledge of that fact, undertakes the transportation, and, through negligence, fails to make the delivery in time, and the conditional purchaser declines to receive the property on account of the delay, the liability of the carrier is measured by the difference between the market value of the property when it arrived at the place of destination and the price at which ⁵⁷⁶ it was conditionally sold before shipment: *Deming v. Grand Trunk Ry. Co.*, 48 N. H. 455, 2 Am. Rep. 267; *Hutchinson on Carriers*, sec. 772.

The difference between the modes of measuring the carrier's liability in the two cases is due to the difference between its obligations and the consequences of their breach. In the former case, the obligation is general and the loss and liability are general, while in the latter case the obligation is special and the loss and liability are special.

Referring to the carrier's responsibility for breach of a special contract by delay, a distinguished author has said: "But if the intended use and application of the goods to be carried was expressly brought to the notice of the company's servants at the time they received them, or could be reasonably inferred from the circumstances known to them, so that the special use or application might be fairly considered to be within the contemplation of both the parties to the contract, the consignor is entitled to recover the damages naturally resulting from his so being unable to use or apply the goods, since both parties may be said to have made this the basis of the contract": 3 Wood's Railway Law, 1607.

The contract breached by the defendant now ⁵⁷⁷ before the court was undoubtedly a special one. The pews in question were manufactured after a peculiar design, for a particular church, under a particular contract, of which the defendant was distinctly notified at the time it accepted them for carriage. The contract of carriage being special, the liability for its non-observance was likewise special, and the plaintiff was entitled to recover all damages naturally resulting from the breach, whatever the amount may have been.

The trial judge in that portion of the charge heretofore quoted, instructed the jury in substance that the proper measure of the plaintiff's recovery, if any should be allowed, would be the penalty of its contract with the consignee for the period the pews were delayed beyond the time therein stipulated as the required date of delivery, which the record shows amounted to one hundred and eighty dollars, the sum actually deducted by the consignee from the purchase price of the pews. That was certainly the amount of the plaintiff's real loss; and in view of the notice given at the time of the shipment, it may fairly and reasonably be assumed to be the exact extent of the injury which the plaintiff and the defendant contemplated as the natural result of so long a delay in the delivery of the pews, and, therefore, the true measure of damages recoverable for the breach.

In opposition to this view it might be said, ⁵⁷⁸ with force and plausibility, that what is denominated the penalty clause of the plaintiff's contract of sale was against public policy, and therefore not enforceable, and that for that reason the carrier, though fully informed of that feature of the contract, would not be legally responsible for the deduction made and permitted thereunder; but that suggestion, if made, could not prevail in

the end; for while contractual penalties, as such, are now rarely enforceable either in law or equity, provisions like that in this contract, whatever called by the parties, when deemed reasonable, as this one must be, are by the courts treated and enforced as stipulations for liquidated damages.

If the contract is for a matter of uncertain value, and a reasonable sum is fixed by the parties as the amount to be paid on breach, that sum, though actually called a penalty in the instrument, is recoverable as liquidated damage if the obligation be not in fact performed: Clark on Contracts, 600, 601; 1 Pomeroy's Equity Jurisprudence, sec. 440; Tennessee Mfg. Co. v. James, 91 Tenn. 154, 30 Am. St. Rep. 865; Kemble v. Farren, 6 Bing. 147; Jacquith v. Hudson, 5 Mich. 123; 10 L. R. Ann. 826 et seq., note; 3 Parsons on Contracts, 156, 157.

It is not uncommon in building contracts, to which class this one belongs, for the contractor, to bind himself to pay a stipulated daily or weekly ⁵⁷⁹ sum for delay beyond the time appointed for completion, and such sum, when reasonable—that is, not excessive—is generally, if not universally, held to be recoverable as liquidated damages, if there be a breach: Clark on Contracts, 600, note; Williams v. Vance, 30 Am. Rep. 31, 32, 35, note.

The enforcement of such a rule against the carrier, with full notice, cannot operate as a hardship upon him, because the sum stipulated by consignor and consignee must be reasonable to be enforceable between them, and for the same reason it must be so before it can be made the measure of responsibility on the part of the carrier. If it be unreasonable or excessive, the stipulation, however named, is a penalty, and only actual damages, to be ascertained in the ordinary way, can be recovered.

“According to the better opinion, the parties, even if they intended to fix upon the amount stipulated as liquidated damages, will, nevertheless, be limited to the recovery of actual damages, if the amount stipulated for is so greatly in excess of the actual damages that it is, in effect, a penalty”: Clark on Contracts, 601; 2 Story's Equity Jurisprudence, sec. 1318; Baird v. Tolliver, 6 Humph. 187, 44 Am. Dec. 298; 3 Parsons on Contracts, 157, 161; Wood's Mayne on Damages, 203, note.

The Illinois Central Railroad Company, as initial carrier, issued a through bill of lading for the ⁵⁸⁰ pews, and routed them over its own line to Louisville, Kentucky, and thence over that of the Chesapeake, Ohio and Southwestern Railroad Company, as ultimate carrier, to Petersburg, Virginia. In the bill

of lading it limited liability for loss or damage to that line on which it should occur; but that limitation, though valid in law (*Bird v. Railroad Co.*, 99 Tenn. 719, 63 Am. St. Rep. 856), is of no avail in this case, because the injury complained of unquestionably resulted from the negligent misdirection in the waybill, made out by the initial carrier before the goods were started upon their journey. The ultimate carrier delivered the goods at the destination for which they were billed in ample time to meet the terms of the contract between the consignor and consignee, but that was not the true destination, and hence not a compliance with the shipping contract. It may be, as suggested in argument and as implied from special instructions requested by the initial carrier and refused by the trial judge, that the ultimate carrier received notice of the misdirection in time to have sent the goods from Parkersburg, West Virginia, to Petersburg, Virginia, sooner than it did, and thereby to have prevented some of the loss to the consignor; yet if that were established as a fact, it would at most only fix joint liability upon the ultimate carrier, and would not lessen the liability of the initial carrier for the consequences of its negligence. ²⁸¹ No limitation can have the effect of relieving a carrier from responsibility for its own negligence: *Bird v. Railroad Co.*, 99 Tenn. 719, 63 Am. St. Rep. 856, and citations.

The court below peremptorily instructed the jury to allow interest on whatever amount the plaintiff should be found entitled to recover as damages, and the jury accordingly included in its verdict fourteen dollars and thirty-one cents as interest. This instruction was erroneous. The plaintiff's demand was not within either the letter or the spirit of the statute (*Shannon's Code*, sec. 3494) enumerating the debts that bear interest as a matter of law. Indeed, it was not for a debt at all, but only for damages. None of the other assignments of error are well taken.

Plaintiff may remit the fourteen dollars and thirty-one cents and have an affirmance as to the balance of the judgment; otherwise a reversal will be entered.

DAMAGES—MEASURE OF, FOR DELAY IN DELIVERY.—If goods are intended for sale in the market at their destination, and the carrier is guilty of negligent delay in their transportation, the proper measure of damages for the delay, in the absence of special circumstances, is the difference between the market value of the goods when delivered and the market value at the time they should have been delivered: See the monographic note to *Norris v. Savar-*

nah etc. Ry. Co., 11 Am. St. Rep. 366; Hudson v. Northern Pac. Ry. Co., 92 Iowa, 231, 54 Am. St. Rep. 550. But in case the owner has made an advantageous sale of the goods, if delivered within a specified time, and the carrier, knowing this, attempts to deliver them within that time, but negligently fails to do so, whereby the shipper loses the sale, the measure of the carrier's liability is the difference between the contract price and the market value of the goods when delivered: See the monographic note to Norris v. Savannah etc. Ry. Co., 11 Am. St. Rep. 366.

PENALTY OR LIQUIDATED DAMAGES.—If damages are uncertain and insusceptible of ready ascertainment, and the sum fixed upon as damages is not unreasonable, it will be treated as liquidated damages; but if the damages are certain and susceptible of ready ascertainment, or if the sum fixed upon is out of all proportion to the probable damages, it will be treated as a penalty: See the monographic note to Williams v. Vance, 30 Am. Rep. 28. In determining the question, the name by which the sum fixed is called by the parties is of slight weight: Kunkel v. Wherry, 189 Pa. St. 198, 69 Am. St. Rep. 802. See, further, the monographic note to Graham v. Bickham, 1 Am. Dec. 331-340.

STATE v. SCHLITZ BREWING COMPANY.

[104 Tennessee, 715.]

CONSTITUTIONAL LAW—TITLES OF STATUTES.—The title of a statute may be either narrow and restricted or broad and general, as the members of the legislature may prefer, and whether it be in the one form or the other in a given instance, all legislation that is germane to the subject expressed in the title is within the title and permissible under it. If the title adopted be narrow and restricted, carving out for treatment only a part of a general subject, the legislation under it must be confined within the same limits, but if it be broad and general, the legislation under it may have a like scope.

CONSTITUTIONAL LAW—TITLES OF STATUTES.—It is never essential that the title of a statute shall recite the subdivisions, provisos, and exceptions appearing in its body, and the fact that they do appear without previous mention in no way affects the constitutionality of the statute, so long as they are germane to the subject expressed in the title.

CONSTITUTIONAL LAW—TITLE OF STATUTE—TRUST LEGISLATION.—The exclusion of agricultural products and livestock in the hands of a producer or raiser from the operation of a statute whose title embraces all trusts and combinations without exception does not render the statute unconstitutional as embracing in its body a subject not expressed in its title.

CONSTITUTIONAL LAW—TRUST LEGISLATION—CLASS LEGISLATION.—If the title of a statute embraces all trusts and combinations, a provision in the statute excluding agricultural products and livestock in the hands of the producer from its operation does not render the statute void as vicious class legislation. Such classification is not arbitrary and capricious, but natural and reasonable.

CONSTITUTIONAL LAW.—A STATUTE AUTHORIZING THE "COURT" to impose a fine and imprisonment for its violation is not unconstitutional as undertaking to confer power upon the "judge" of the court not possessed by him under the constitution. In such case the word "court" refers to the court and jury, and not to the "judge."

CONSTITUTIONAL LAW—RESTRICTION ON RIGHT TO CONTRACT.—ANTI-TRUST STATUTES are not unconstitutional simply because they restrict and regulate the right to contract. The right of contract is a part of both the right of property and the right of liberty, but it is subject to legislative restriction and control.

CONSTITUTIONAL LAW—STATUTES—CONSTRUCTION. Statutes regularly passed, when attacked as unconstitutional, are entitled to the benefit of every reasonable doubt, and, if susceptible of two meanings, that one must be adopted, though the less plausible, which reconciles it to the constitution, rather than another which makes it conflict therewith.

CONSTITUTIONAL LAW—STATUTES—TITLE.—A constitutional requirement that a statute shall have but one subject, which must be expressed in its title, is mandatory, and the legislation, to be valid, must always come within the title, whether it be narrow and restricted or broad and general.

CONSTITUTIONAL LAW—POLICY OF LEGISLATION.—The wisdom, policy, and expediency of a statute is purely a question of legislative discretion not reviewable by the courts.

CONSTITUTIONAL LAW—STATUTES—TITLE.—The title of a statute with the regulation of commerce or trade as its expressed subject is broad enough to include dealings in both imported and domestic commodities.

CONSTITUTIONAL LAW—STATUTES—LAW OF LAND. To entitle a statute to recognition as the law of the land on the particular subject treated therein, it must have been passed with due form and ceremony, and it must embrace equally all persons then, or who may thereafter be, in like condition, and, if class legislation, it must, in addition, be natural and reasonable in its classification, and it must conform to all other requirements of the constitution.

EQUITY JURISDICTION TO ENFORCE STATUTE.—A court of chancery has jurisdiction to enforce by injunction or otherwise, against foreign or domestic corporations, or their agents, the forfeitures provided by a valid anti-trust statute. Such proceeding is due process of law without any previous judgment or conviction in a court of law.

CORPORATIONS.—FOREIGN CORPORATIONS HAVE NO ABSOLUTE RIGHT to recognition in the state. They may be admitted on such terms and conditions as the state may impose, or they may be excluded altogether.

G. W. Pickle, attorney general, and W. W. Goodwin, for the appellant.

L. and E. Lehman, for the appellee.

⁷²⁰ **CALDWELL, J.** The bill in this cause was brought in the name of the state of Tennessee, on the relation of W. B. Astor, against the Schlitz Brewing Company, a foreign cor-

poration with its situs in Milwaukee, Wisconsin, and Sigmund Roescher, its agent in Tennessee.

The complainant alleged as matter of fact, in substance, that the defendants, as principal and agent, had entered into, and for years had enforced, and were still enforcing, an arrangement, ⁷²¹ contract, agreement, trust, or combination with the Tennessee Brewing Company, a domestic corporation, with its situs and principal place of business at Memphis, Tennessee, and with other brewers, for the purpose and with the tendency and effect of lessening competition in the importation and sale of beer, and of dominating and controlling the price thereof in this state, and charged as matter of law, in substance, that the Schlitz Brewing Company thereby violated the provisions of section 1 of chapter 94 of the Acts of 1897, and, as declared in section 2 of that act, forfeited the right to do business in this state; and prayed that the Schlitz Brewing Company be forever restrained by injunction from transacting business in this state.

The defendants demurred to the bill on numerous grounds, some assailing the act referred to as unconstitutional in several particulars, some denying the jurisdiction of the chancery court, and others disputing the sufficiency of the facts alleged.

The chancellor sustained one assignment of demurrer as to the unconstitutionality of the act, one as to the want of jurisdiction of the court, but overruled all the others. Both the complainant and the defendants have appealed, and their assignments of error, when combined, present all the questions raised by the demurrer except those relating to the sufficiency of the facts alleged in the bill.

⁷²² The act whose provisions are invoked by the complainant, and whose constitutionality is called in question by the defendants, is familiarly known as the anti-trust statute of 1897. Its terms, title, and body are as follows:

"An act to declare unlawful and void all arrangements and contracts, agreements, trusts, or combinations made with a view to lessen, or which tend to lessen, free competition in the importation or sale of articles imported into this state; or in the manufacture or sale of articles of domestic growth or of domestic raw material; to declare unlawful and void all arrangements, contracts, agreements, trusts, or combinations between persons or corporations, designed, or which tend, to advance, reduce, or control the price of such product or articles to producer or consumer of any such prod-

- uct or articles; to provide for forfeiture of the charter and franchise of any corporation, organized under the laws of this state, violating any of the provisions of this act; to prohibit every foreign corporation, violating any of the provisions of this act, from doing business in this state; to require the attorney general of this state to institute legal proceedings against any such corporations violating the provisions of this act, and to enforce the penalties prescribed; to prescribe penalties for any violation of this act; to authorize any person or corporation, damaged by any such trust, agreement, or combination, to sue for the recovery of such damages, and for other purposes.

“Section 1. Be it enacted by the general assembly of the state of Tennessee, and it is hereby enacted by the authority of the same, that from and after the passage of this act all arrangements, contracts, agreements, trusts, or combinations between persons or corporations, made with the view to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into this state, or in the manufacture or sale of articles of domestic ⁷²³ growth or of domestic raw material, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance, reduce or control the price or cost to the producer or to the consumer of any such product or article, are hereby declared to be against public policy, unlawful and void.

“Sec. 2. Be it further enacted, that any corporation chartered under the laws of this state which shall violate any of the provisions of this act shall thereby forfeit its charter and its franchise, and its corporate existence shall thereupon cease and determine. Every foreign corporation which shall violate any of the provisions of this act is hereby denied the right to do, and is prohibited from doing, business in this state. It is hereby made the duty of the attorney general of this state to enforce the provisions by due process of law.

“Sec. 3. Be it further enacted, that any violation of the provisions of this act shall be deemed, and is hereby declared to be, destructive of full and free competition and a conspiracy against trade, and any person or persons who may engage in any such conspiracy, or who shall as principal, manager, director, or agent, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or orders made in further-

ance of such conspiracy, shall, upon ⁷²⁴ conviction, be punished by a fine of not less than one hundred dollars or more than five thousand dollars, and by imprisonment in the penitentiary not less than one year, nor more than ten years; or in the judgment of the court by either such fine or imprisonment.

"Sec. 4. Be it further enacted, that the provisions of this act shall not apply to agricultural products or livestock while in the possession of the producer or raiser.

"Sec. 5. Be it further enacted, that any person or persons, or corporation, that may be injured or damaged by any such arrangement, contract, agreement, trust, or combination described in section 1 of this act, may sue for and recover in any court of competent jurisdiction in this state, of any person or persons, or corporation, operating such trust or combination, the full consideration or sum paid by him or them for any goods, wares, merchandise, or articles the sale of which is controlled by such combination or trust.

"Sec. 6. Be it further enacted, that it shall be the duty of the judge of the circuit and criminal courts of this state specially to instruct grand juries as to the provisions of this act.

"Sec. 7. Be it further enacted, that all laws and parts of laws in conflict with the provisions of this act be, and the same are hereby, repealed.

"Sec. 8. Be it further enacted, that this act ⁷²⁵ take effect from and after its passage, the public welfare requiring it.

"Passed April 5, 1897.

"MORGAN C. FITZPATRICK,

"Speaker of the House of Representatives.

"JOHN THOMPSON,

"Speaker of the Senate.

"Approved April 30, 1897.

"ROBERT L. TAYLOR,

"Governor."

The fourth assignment of demurrer, which is one of the two sustained below, is that the act just quoted is unconstitutional and void for the reason that the caption thereof recites it to be an act to declare unlawful and void all arrangements, contracts, agreements, trusts, or combinations such as is averred the Schlitz Brewing Company and Sigmund Roescher, its agent, entered into with the Tennessee Brewing Company, and the fourth section of said act provides that the provisions thereof

shall not apply to agricultural products or livestock while in the hands of the producer or raiser, which makes it obvious that under the title of one subject forbidding all trusts, agreements, contracts, or combinations aforesaid, an exception or limitation is made in said fourth section, not in accord with or in pursuance of the title of said act, and that therefore said act embraces in the fourth section a subject not contemplated ⁷²⁶ in, but in direct antagonism to, the specific terms of the said title.

The particular provision of the constitution here referred to by the demurrants is article 2, section 17, clause 2, which declares that "no bill shall become a law which embraces more than one subject, that subject to be expressed in the title"; and the proposition they present in this assignment of demurrer is, that the fourth section of the present act violates that provision by introducing a subject not embraced in the title, and that the whole act is, therefore, unconstitutional and void.

The proposition is unquestionably a sound one, if it be true as a fact that section 4 of the act introduces a subject not embraced in the title; for that requirement of the organic law is mandatory both as to the singleness of the subject of the bill and as to the expression of that subject in the title, and if a given bill embraces two subjects, or but one subject—and it is not expressed in the title, the attempted legislation is invalid in toto: *Cannon v. Mathes*, 8 Heisk. 504; *State v. McCann*, 4 Lea, 1; *Murphey v. State*, 9 Lea, 379; *Ragio v. State*, 86 Tenn. 275; *Cole Mfg. Co. v. Falls*, 90 Tenn. 482; *State v. Yardley*, 95 Tenn. 546.

The title to this act is unnecessarily full and extended, in that it needlessly undertakes to epitomize and recite in considerable detail the legislation ⁷²⁷ to follow: *Black's Constitutional Law*, sec. 107; *State v. Brown*, 103 Tenn. 450; *State v. Yardley*, 95 Tenn. 546.

The essence of the subject expressed is the prohibition and punishment of those transactions which are calculated to lessen competition in trade, or to influence the price of either imported or domestic articles; and it requires only a casual reading of sections 1, 2, 3, and 5 of the act to discover that each of them deals with some part of that subject, the former two employing practically the same language used in the title.

The fourth section obviously relates to the same subject, and to that alone. It mentions no new or different subject, directly or indirectly, and adds nothing to the scope of the other sec-

tions, but, on the contrary, limits their application in express terms. The fourth section is purely restrictive and exclusionary. It is in the nature of an exception, and its only office is to except or exclude from the operation of the act a small portion of the domain otherwise included, and thereby bring the legislation within somewhat narrower limits. The legislation included in the other sections is undoubtedly within the subject expressed in the title; hence, this section, which only excepts or excludes certain transactions from the prohibition and penalties of that legislation, necessarily relates to that subject, and to it alone.

It is a contradiction in terms and in logic to ⁷²⁸ say that the transactions excepted by the fourth section are not embraced in the subject expressed in the title, and that excepting them is the introduction of a new subject—that the exclusion of a part of one thing is the inclusion of something else. That which excepts does not enlarge, and that which is excluded cannot be additional.

The title of a legislative bill may be either narrow and restricted or broad and general, as the members of the general assembly may prefer, and, whether it be in the one form or the other in a given instance, all legislation that is germane to the subject as expressed in the title is within the title and permissible under it; but of course much that might be germane under the latter class of titles could not be so under the former.

If the title adopted be narrow and restricted, carving out for treatment only a part of a general subject, the legislation under it must be confined within the same limits (*State v. Bradt*, 103 Tenn. 584; *Hyman v. State*, 87 Tenn. 109, 113; *Cooley's Constitutional Limitations*, 5th ed., 179); if it be broad and general, the legislation under it may have a like scope.

In every instance the enactment must come within the title, but in no case is it required to cover the whole domain within the title. The constitution forbids that an enactment shall go beyond the limits of its title, but there is no ⁷²⁹ requirement that it shall completely fill it. Our statute books afford numerous instances of somewhat meager enactments under ample titles, and there are perhaps but few of those with broad and general titles that would not admit of some additional provision.

It is of no legal consequence that the present title does not mention the exception, because it is never essential that the

title of a bill recite the subdivisions, provisos, and exceptions appearing in its body, and the fact that they do appear without previous mention in no way affects the constitutionality of the act, so long as they are germane to the subject expressed in the title: *State v. Brown*, 103 Tenn. 450; *Cannon v. Mathes*, 8 Heisk. 519; *Railroad Cos. v. Crider*, 91 Tenn. 494; *State v. Yardley*, 95 Tenn. 546.

Indeed, every title admits of exceptions in the body of the act, unless it be so framed as to "specifically and positively" forbid them, as was held to be true of the title of the act considered in *Bank v. Divine Grocery Co.*, 97 Tenn. 603.

The title of the act now under consideration is not of the latter class. It does not "specifically and positively," or in any other manner, forbid the exception; hence, the exception, being germane to the subject expressed, is admissible under the title employed.

Nor does it matter that the exception appears ⁷³⁰ in a section by itself. The act must be construed as a whole, and when that is done it has precisely the same meaning that it would have if the exception had been appropriately incorporated in the other sections. If the meaning be clear, the relative position of the exception in the enactment is unimportant.

Demurrants say that the exception is out of accord with, in antagonism to, and not within the contemplation of the title; but that is a mistake, since, as already stated, the title, though not reciting the exception, legally includes and authorizes it.

It follows from what has been said that section 4 of this act does not introduce a subject not expressed in the title, and that the learned chancellor was in error in sustaining the fourth ground of demurrer.

The seventh and the twelfth assignments of demurrer also challenge the constitutionality of the act on account of the fourth section. The seventh is that the act "in making the exception contained in the fourth section thereof is in violation of the fourteenth amendment of the constitution of the United States, in denying to persons made amenable to the provisions thereof, within the jurisdiction of Tennessee, the equal protection of the laws"; and the twelfth is that the act is "void because it does not apply to all persons, there being excepted from its operation agricultural ⁷³¹ products and livestock while in the possession of the producer or raiser, and said act is therefore partial and class legislation, and is not the law of the land."

These two assignments, though involving parts of two different fundamental laws (the former United States constitution, amendment 14, section 1, and the latter Tennessee constitution, article 1, section 8, and article 11, section 8), really raise but one question and may well be considered as a single objection.

That question is whether or not the exception found in the fourth section is of such a character as to make the act invalid class legislation.

There can be no doubt, in view of the exception, that the prohibition and penalties of the act apply to some citizens and classes of citizens and not to others, and consequently that the enactment may be appropriately and truly characterized as class legislation. Hence, if the mere fact of being class legislation is sufficient to invalidate the act, its invalidity should be confessed and the inquiry stopped at the threshold. But the act cannot be adjudged invalid on that ground alone.

Class legislation is of two kinds, namely, that in which the classification is natural and reasonable, and that in which the classification is arbitrary and capricious.

Enactments of the former kind are uniformly ⁷³² recognized by the supreme court of the United States and by this court as constitutional and valid, while those of the latter kind are by the same courts, and with equal uniformity, condemned as unconstitutional and invalid: *Petit v. Minnesota*, 177 U. S. 164; *Tullis v. Lake Erie etc. R. R. Co.*, 175 U. S. 348; *Orient Ins. Co. v. Daggs*, 172 U. S. 557; *Magoun v. Illinois Trust etc. Bank*, 170 U. S. 283; *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 150; *Lowe v. Kansas*, 163 U. S. 81; *Harbison v. Knoxville Iron Co.*, 103 Tenn. 423, 76 Am. St. Rep. 682; *State v. Frost*, 103 Tenn. 686; *Breyer v. State*, 102 Tenn. 103; *Railroad Co. v. Harris*, 99 Tenn. 686; *Sutton v. State*, 96 Tenn. 696, 710; *Henley v. State*, 98 Tenn. 667; *Stratton v. Morris*, 89 Tenn. 500; *Railroad Cos. v. Crider*, 91 Tenn. 490; *State v. Alston*, 94 Tenn. 674.

In the case of *Magoun v. Illinois Trust etc. Bank*, 170 U. S. 294, the court said that "the state may distinguish, select, and classify objects of legislation, and necessarily the power must have a wide range of discretion." After quoting these words with approval in *Orient Ins. Co. v. Daggs*, 172 U. S. 562, the court remarked: "And this because of the function of legislation and the purposes to which it is addressed. Classification for such purposes is not invalid because not depending on scien-

tific or marked differences in things or persons, or in ⁷³³ their relations. It suffices if it is practical, and is not reviewable unless palpably arbitrary."

To which of the two kinds of class legislation, then, does the present act belong? Is the classification it makes natural and reasonable, or is it arbitrary and capricious?

The act condemns (in section 1) and punishes (in sections 2, 3, and 5) "all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view to lessen or which tend to lessen full and free competition in the importation or sale of articles imported into this state, or in the manufacture or sale of articles of domestic growth or of domestic raw material, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed or which tend to advance, reduce, or control the price or cost to the producer or to the consumer of any such product or article," except (section 4) such as may be entered into by the owners in reference to "agricultural products or livestock while in the possession of the producer or raiser." Differently expressed, the act leaves farmers and stock-raisers free to make such transactions as they may choose, and as are otherwise allowable (for the common law allows no one to make transactions in restraint of trade: *Bailey v. Master Plumbers*, 103 Tenn. 99), in relation to their farm products and livestock while yet in their possession; but ⁷³⁴ visits the prescribed punishment on them, and on all other persons for all other transactions that are calculated to impair free competition in trade and to influence the price of imported or domestic articles.

Farmers and stock-raisers constitute the excepted class, and they are excepted from the penalties of the act only in respect of those transactions which relate to farm products or livestock while yet in the possession of the producer or raiser. Even they are not excepted when they enter into other lines of business, or when they have transactions in relation to agricultural products or livestock which have passed out of the possession of the original owner.

This classification is not arbitrary and capricious, but natural and reasonable. From an early period in the history and growth of English jurisprudence the common law has denounced as contrary to public policy, void, and nonenforceable all contracts, agreements, arrangements, and combinations, of whatever name and form, that tend to impair competition in

trade and influence prices to the detriment of the public: *Bailey v. Master Plumbers*, 103 Tenn. 99. The general assembly, deeming that rule of the common law inadequate in this advanced and enterprising age, supplemented and enlarged it, first by the act of 1889, chapter 250, then by the act of 1891, chapter 218, and finally by the act now in question. ⁷³⁵ The additional restraints by that body considered necessary for the public good are by this act laid upon those dealings that are naturally and necessarily calculated to entail the greater public injury, and others are left under the restraints of the common law and of such parts (if any) of previous acts as were not impliedly repealed. Obviously, those transactions that are excepted from the penalties of this act rarely, if ever, result in evil to the public, while those upon which the penalties are imposed are believed to have that effect generally. Allowing that all persons, natural and artificial, are alike ambitious of financial gain and equally willing to acquire it through the means reprehended so distinctly in this act, it is nevertheless true that farmers and stock-raisers in this state, when acting within their limited sphere of immunity from those penalties, have at most but few opportunities and slight facilities for impairing competition and controlling prices, while those of many of the other pursuits have such opportunities and facilities almost without limit. This difference alone, to say nothing of others that may have been in the minds of legislators, is amply sufficient to justify the classification made and place it beyond judicial review.

It might be truly said, in opposition to the distinction just drawn, that agricultural products and livestock furnish the basis for some of ⁷³⁶ the most hurtful and oppressive trusts, combines, and corners known to the history of trade; and yet it is certain that none of these have ever been, or can ever be, projected and carried out by farmers or stock-raisers when dealing alone with their products or livestock while yet in the possession of the producer or raiser. It is wholly impracticable, not to say impossible, for them as individuals, and while each one retains the possession of his farm products or livestock, to conduct dealings in relation thereto that will or can seriously impair competition and injuriously affect prices; and if they, the better to accomplish that end, by mutual consent place their commodities under the control of the common agency, and subject them to agreed rules and schedules, they thereby sur-

render the possession contemplated by the act, and are no longer of the excepted class, but of the other one, and subject to all the penalties laid upon it.

The difference between the two classes can be well and fairly emphasized, though not fully illustrated, by contrasting the position and influence of farmers in the disposition of their wheat, corn, hops, sugar-cane, and cotton seed, with those of the milling trust, the whisky trust, the beer trust, the sugar trust, and the Standard Oil Company in their dealings in relation to the same commodities respectively.

The classification made in the different acts ⁷³⁷ sustained separately in *Magoun v. Illinois Trust etc. Bank*, 170 U. S. 283, *Orient Ins. Co. v. Dagga*, 172 U. S. 557, *Tullis v. Lake Erie etc. R. R. Co.*, 175 U. S. 348, *Petit v. Minnesota*, 177 U. S. 164, *State v. Alston*, 94 Tenn. 674, *Railroad Cos. v. Crider*, 91 Tenn. 490, *Henley v. State*, 98 Tenn. 667, *Railroad Co. v. Harris*, 99 Tenn. 686, *Breyer v. State*, 102 Tenn. 103, *State v. Frost*, 103 Tenn. 686, and in numerous other cases that might be cited, are no more natural and reasonable, and no less arbitrary and capricious, than is that made in the act now under consideration; hence, each of those cases is a precedent for the conclusion just announced herein.

Defendants place much reliance on the case of *Union Sewer Pipe Co. v. Connelly*, 99 Fed. Rep. 354, wherein Kohlsaat, district judge, held that the presence of an exception like that found in our act, in the Illinois anti-trust statute of 1893, rendered it obnoxious to both federal and state constitutions. But, with deference, we decline to follow that decision, unsupported by discussion or the citation of authorities as it is, over our own conviction and in the face of the numerous cases mentioned in this opinion.

The seventh and twelfth grounds of demurrer were rightly overruled by the chancellor.

The fifth assignment of demurrer is as follows:

"Said act, in the third section thereof, provides ⁷³⁸ that upon any violation thereof the violator, upon conviction, shall be punished by a fine of not less than one hundred dollars nor more than five thousand dollars, and by imprisonment in the penitentiary not less than one year nor more than ten years, or, in the discretion of the court, by either such fine or imprisonment, which is violative of section 14, article 6, of the constitution of Tennessee, in authorizing the court to lay a fine

exceeding fifty dollars not assessed by a jury, the fine being discretionary, and also allowing the imposition of such fine and imprisonment by the court in the alternative."

This assignment calls for a construction of the word "court," appearing in the concluding clause of the impeached section, and for an application of that part of the organic law which declares that "no fine shall be laid on any citizen of this state that shall exceed fifty dollars, unless it shall be assessed by a jury of his peers, who shall assess the fine at the time they find the fact, if they think the fine should be more than fifty dollars": Const., art. 6, sec. 14.

Demurrants assume that the word "court," as employed in that part of the act, means the presiding judge as contradistinguished from the jury trying the case; and upon that theory they say the constitutional prohibition referred to is violated by the attempt to confer upon him, as judge, the right to assess a fine, in his discretion, ⁷³⁹ at any sum not less than one hundred dollars nor more than five thousand dollars.

If that assumption be correct, there can be no doubt that the conclusion contended for is entirely sound. The terms of the inhibition are too plain and positive to admit of any other interpretation: *McGhee v. State*, 2 Lea, 625; *Morton v. State*, 91 Tenn. 443.

The judge, as such, can impose a fine for more than fifty dollars only when the legislature has definitely fixed a larger and specific fine for the particular offense, and then he determines the amount of the fine from the face of the statute, and not as a matter of judicial discretion: *France v. State*, 6 Baxt. 479.

The term "court," however, was evidently not intended as a designation of the presiding judge in his distinctive functions, but rather as a collective word, indicating the tribunal before which the conviction should be had, and including both judge and jury. The same word, standing in like connection, was so construed in the case of *Railroad Cos. v. Crider*, 91 Tenn. 490.

Moreover, if the true intent of the legislature were doubtful, and the act at this point were susceptible of both constructions, and that presented by the defendants were conceded to be the more plausible, still the court, out of deference to a co-ordinate branch of the government, would resolve the doubt in favor of the constitutionality ⁷⁴⁰ of the act and adopt that construction that would permit it to stand.

Acts passed with due form and ceremony, as this one was, when tried for unconstitutionality, as this one is, are entitled to the benefit of every reasonable doubt: *Cole Mfg. Co. v. Falls*, 90 Tenn. 466; *Railroad Co. v. Crider*, 91 Tenn. 491; *State v. Yardley*, 95 Tenn. 548; *Austin v. State*, 101 Tenn. 564, 70 Am. St. Rep. 703; *Railroad Co. v. Harris*, 99 Tenn. 686; *Henley v. State*, 98 Tenn. 666.

The sixth assignment of demurrer is that the act "is unconstitutional and void for the further reason that the fifth section thereof provides that any person or persons who may be injured or damaged by any such arrangement, agreement, contract, trust, or combination, as described in section 1 thereof may sue for and recover damages from any person or persons engaged in operating such trust, contract, or combination, the full consideration or sum paid by him or them for any goods, wares, merchandise, or articles, the sale of which is controlled by such combination or trust, which is a subject not embraced in the title of said act, and gives a remedy against a corporation in favor of a private citizen to an extent that might swallow up the assets of the corporation to the great injury, loss, and detriment of its innocent stockholders and creditors."

It is readily observed that the latter part of this assignment, in which demurrants express themselves ^{¶41} so strongly in regard to the supposed effect of the remedy complained of, involves only a question of legislative policy, which the courts have no power to review if in fact hurtful, and which can have no weight in the consideration of the constitutional question presented in the former part: *Sutton v. State*, 96 Tenn. 696; *Reelfoot Lake Levee Dist. v. Dawson*, 97 Tenn. 159; *Henley v. State*, 98 Tenn. 665; *Railroad Co. v. Wells*, 104 Tenn. 706.

Omitting, then, that animadversion as irrelevant and immaterial, the real objection presented in this assignment is that the remedy prescribed in section 5 of the act is not embraced in the subject expressed in the title.

In the argument at the bar the objection is made more specific when it is said that the title limits the remedy to actual damages, and hence that the provision in the body of the act that the damaged person may recover the full consideration paid for the goods whose sale is controlled by the trust or combination goes beyond the subject expressed in the title.

As before ruled in this opinion, that provision of the constitution (clause 2, section 17, article 2) here for the second time invoked against this act is mandatory, and legislation, to

be valid, must always come within the title, whether it be narrow and restricted or broad and general.

The subject of this act, as already stated, is ⁷⁴² the prohibition and punishment of those transactions which are calculated to lessen competition in trade, or to influence the price of either imported or domestic articles. This subject, if expressed in the title in these words, would unquestionably embrace the provision found in section 5 of the act, for the word "punishment" would include civil relief to the injured person against the wrongdoer. But the title is more elaborate; and it is in its excess of elaboration that demurrants find the supposed limitation in the matter of civil remedy to the person damaged by some prohibited transaction of others. On this point, and in its conclusion, the title recites that one object of the act is "to authorize any person or corporation, damaged by any such trust, agreement, or combination, to sue for the recovery of such damages, and for other purposes."

This language may be plausibly said to contemplate a provision for the recovery of actual damages, but it is not so restrictive as to preclude the insertion of a provision for a different measure of recovery. With that recitation, or without it, section 5 is confessedly germane to the general purpose of the act, and being so it cannot consistently be said to bring in a different subject, or to be excluded from that of which it is a part, in the absence of the plainest words of exclusion.

Besides, it cannot be affirmed with any degree ⁷⁴³ of certainty that the measure of recovery prescribed in the act is not in fact within the bounds of actual damages, for it is a matter of common knowledge that men who in their business become the injured victims of trusts or combinations often suffer not only a depreciation in the salable value of their commodities then on hand, but also a complete destruction of their business for the future; and the aggregate losses so sustained in many instances greatly exceed the prices they originally paid for the commodities in question.

Furthermore, if treated as a penal provision, as demurrants are disposed to call it, section 5 is clearly within both letter and spirit of the other title recitation, "to prescribe penalties for any violation of this act."

The tenth assignment of demurrer is that the act "is void because it contains two subjects, one relating to arrangements, contracts, agreements, trusts, or combinations, made with a view to lessen, or which tend to lessen, the importation or sale

of articles imported into this state, which is an interference with interstate commerce, which is under the sole control and regulation of the Congress of the United States; and the other relating to the manufacture or sale of the articles of domestic growth."

Here, for the third time, this act is impeached as in violation of the second clause of ⁷⁴⁴ the seventeenth section of the second article of the constitution of the state; but, differing from the former two impeachments, which asserted that certain sections, respectively, dealt with subjects not embraced in the title, this one invokes the preceding part of the clause, and asserts that the act is void because containing two subjects.

It is worthy of repetition at this point that both parts of the clause in question ("no bill shall become a law which embraces more than one subject, that subject to be expressed in the title") are mandatory, and that an act containing two subjects expressed in the title, as well as one containing a single subject not expressed in the title, is absolutely null and void.

Nothing is more obvious than that this act in its title and in its body includes dealings in reference to both imported articles and domestic articles. Yet it by no means follows from that fact that two subjects are embraced. On the contrary, it is equally manifest to the court that the contemplated dealings as to the one class of articles and those as to the other class of articles form only different parts of a single subject. The thing condemned and punished by the act is injury to trade. The thing intended to be protected is trade; and trade undeniably includes dealings in both imported and domestic commodities.

It is well said that domestic commerce and interstate commerce are different things; still both ⁷⁴⁵ are comprehended in the single word "commerce"; and a title with the regulation of commerce as its expressed subject would, beyond doubt, be broad enough to include provisions as to both domestic commerce and interstate commerce.

This last observation, however, is not to be understood as even an intimation that the state legislature may pass an act regulating interstate commerce, or that the present one is, as demurrants assert, an interference therewith, for in reality the court holds the opposite view on each of the propositions.

The eleventh assignment of demurrer is that the act "is void because in forbidding combinations, trusts, agreements, contracts, or arrangements, it contravenes the provisions of the

constitution of Tennessee by restricting the disposition and acquisition of private property by citizens of this state."

This assignment, though rather vague and not made more specific in argument, is understood as challenging the act on account of alleged conflict with that part of section 8 of article 1 of the constitution, which declares that "no man shall be deprived of his life, liberty, or property but by the law of the land."

Definitely formulated, the proposition seems to be that the constitutional provision just quoted gives to all citizens of the state the unrestricted right of acquiring and disposing of property, and ⁷⁴⁶ that this act is void because it contravenes that right by forbidding certain contracts, etc., through which property may be acquired and disposed of. So stated, the proposition is altogether unsound in its most important element.

The right of contract is confessedly an inherent part of both the right of "liberty" and the right of "property," and deprivation of it is, therefore, equally forbidden by that provision; but none of them are unrestricted rights. All are subject to the law's control, and may be abridged, or even destroyed, within constitutional bounds. None of them can be impaired or taken away except by "the law of the land"; yet all of them may be curtailed or entirely withdrawn by that means. The declaration against deprivation otherwise than by "the law of the land" necessarily implies that deprivation may be rightly accomplished and amply justified by that law: *Harbison v. Knoxville Iron Co.*, 103 Tenn. 422, 431, 76 Am. St. Rep. 682, and citations; *Dayton Coal etc. Co. v. Barton*, 103 Tenn. 605. (Attention is called to a typographical mistake appearing near the top of page 430 of 103 Tennessee, in the report of the opinion in the case of *Harbison v. Knoxville Iron Co.* just cited. The word "property," occurring partly in line 6 and partly in line 7 from the top of that page, was the beginning of a paragraph in the opinion as written, and the authorities set out before it in the same sentence as reported were cited in ⁷⁴⁷ the opinion to support the proposition immediately preceding.)

The real question, then, under this assignment is, whether or not the present act is "the law of the land." If an affirmative answer be given, the act is valid, however great the deprivation of the right of contract wrought by it, and if a negative answer be given, the act is invalid, however small that deprivation.

To entitle an act to recognition as "the law of the land" on

the particular subject of which it treats, three things are indispensable, namely: 1. It must have been passed with due form and ceremony; 2. It must embrace equally all persons who are now or may hereafter be in like condition, and, if class legislation, it must in addition be natural and reasonable in its classification; 3. It must conform to all other requirements of the constitution: *Harbison v. Knoxville Iron Co.*, 103 Tenn. 423, 437, 76 Am. St. Rep. 682, and citations.

All of those prerequisites are present in this act. It is therefore entitled to recognition as "the law of the land," and being so the deprivation complained of is in conformity to rather than in conflict with the constitution.

In further refutation to the mistaken assumption that every citizen has an unrestricted right to acquire and dispose of property by such contract as he may choose to make, we quote from ⁷⁴⁸ the supreme court of the United States as follows: "It would be idle and trite to say that no right is absolute. *Sic utere tuo ut alienum non laedas* is of universal and pervading obligation. It is a condition upon which all property is held. Its application to particular conditions must necessarily be within the reasonable discretion of the legislative power": *Orient Iron Ins. Co. v. Daggs*, 172 U. S. 566.

The first assignment of demurrer, which is the other one of the two sustained by the chancellor, is in the following words: "The alleged cause of action set up in said bill is not cognizable in any court of chancery in Tennessee, and this court has no jurisdiction of any of the matters set up in the bill, and the exclusive jurisdiction to hear and determine the same is vested in a court of law—that is, in the circuit court of Shelby county, Tennessee, or some other circuit court of Tennessee."

As has been seen, section 3 of the act prescribes criminal punishment, and section 5 prescribes, additionally, a pecuniary civil liability for all violations of any of its provisions. Section 2 lays still another penalty on all corporations doing the prohibited things. It declares that any domestic corporation "which shall violate any of the provisions of this act shall thereby forfeit its charter and franchise, and its corporate existence ⁷⁴⁹ shall thereupon cease and determine," and that "every foreign corporation which shall violate any of the provisions of this act, is hereby denied the right to do so, and is prohibited from doing business in this state."

It is this penalty laid on the offending class of foreign corpo-

rations that the complainant in this cause seeks to enforce against the Schlitz Brewing Company, a foreign corporation.

Demurrants say that the action does not lie in the chancery court, and the chancellor so ruled. That ruling is incorrect, for two good and sufficient reasons. In the first place, the statutory declaration that the offending foreign corporation "is prohibited from doing business in this state" carries the implication that this penalty may be enforced by prohibitory injunction, which is a process peculiar to a court of equity; and in the second place, chapter 97 of the acts of 1877 (Shannon's Code, sec. 6109) gives the chancery court concurrent jurisdiction with the circuit court in all civil causes of action, except those for injuries to the person, to property or character, involving unliquidated damages, and in so doing it expressly makes this cause of action, which is not of the excepted class, cognizable in the chancery court.

Section 2 concludes with the sentence: "It is hereby made the duty of the attorney general of ⁷⁵⁰ this state to enforce the [these?] provisions by due process of law."

As here employed the phrase "by due process of law" is the equivalent of the other phrase, "in any court of competent jurisdiction," appearing in other statutes, and it does not otherwise indicate any particular tribunal. Its meaning here is wholly different from the meaning of the same phrase as used in the federal constitution and in several of the state constitutions, where it has the same significance as have the words "by the law of the land," appearing in the Tennessee constitution and in Magna Charta.

The present bill is a proceeding by due process of law within the meaning of this statute.

The third assignment of demurrer, which also goes to the jurisdiction of the court, is that "the said bill is preferred under the provisions of the said act of the general assembly of Tennessee of 1897 to enjoin the Schlitz Brewing Company, as a foreign corporation, from doing business in the state of Tennessee, upon allegations that it has violated the provisions of said act, without alleging or attempting to show that any proceeding has been instituted at law which resulted in the conviction of the said corporation in that behalf, and without such antecedent proceedings a court of chancery has no jurisdiction to enjoin said corporation from engaging in or doing business in the state of Tennessee."

⁷⁵¹ It is in no sense essential to the complainant's right to

maintain this action that there should have been an antecedent conviction in a court of law. The penalty whose enforcement is here sought is apart from and independent of a criminal conviction. It is prescribed in a different section of the act, is expressed in unconditional terms, and is entirely without dependent connection with either the criminal responsibility or the pecuniary liability prescribed separately in the other two sections respectively. Any court having jurisdiction to enforce any penalty or remedy provided for in the act was obviously intended to have, and manifestly has, jurisdiction also to first adjudge the fact of violation on which the enforcement must ultimately find its support and justification.

The second assignment of demurrer disputes the court's jurisdiction as to the agent of the main defendant. It is as follows: "The said bill is preferred against the Schlitz Brewing Company as a foreign corporation, under the provisions of chapter 94 of the acts of the general assembly of Tennessee of 1897, to enjoin the said Schlitz Brewing Company from doing business in the state of Tennessee for alleged violation of the said act, and Sigmund Roescher, as its agent, is made a defendant, and under said act this court is without jurisdiction to render a decree against the said Roescher."

Since the third section of the act is the only ⁷⁵² one that provides a personal remedy against an agent, the same being a criminal prosecution, and this action is brought under section 2, it is clear that the court has no jurisdiction to render a decree against this agent in his own right. Indeed, no personal decree is sought or could be rendered against him in the first instance.

Nevertheless, as corporations can do their legitimate business by agents only, and can be restrained from doing that which is prohibited alone through coercion of their representatives, it is altogether proper, if not necessary in this cause, that the resident agent of the nonresident codefendant be a party before the court; otherwise there might be difficulty and embarrassment in enforcing the relief prayed for if granted.

In connection with the observation that no personal decree can be rendered against this agent in the first instance, it should be added that if an injunction against him in his representative capacity should be violated, his relation to the cause would then and thereby become personal for the purposes of contempt proceedings.

In conclusion, it may be added that the legislature was clearly within the scope of its constitutional power when it prescribed the penalty sought to be enforced in this proceeding. The principal defendant, being a foreign corporation, has no absolute right to recognition in this state. It may be admitted on such terms and conditions as the ⁷⁵³ legislature, in its discretion, may see fit to impose, or it may by the same body be excluded altogether: *Paul v. Virginia*, 8 Wall. 168.

Its right here to engage in business, not of a federal nature, "depends solely upon the will" of the state: *Hooper v. California*, 155 U. S. 648. Cases to the same effect are too numerous to mention, but see particularly *State v. Phoenix Ins. Co.*, 92 Tenn. 420; *Dugger v. Insurance Co.*, 95 Tenn. 246; *Orient Ins. Co. v. Daggs*, 172 U. S. 566; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28.

In the last case a provision of the Texas anti-trust statute, identical in its penalty with that which this complainant seeks to enforce, was elaborately considered and upheld as valid and enforceable.

It results from all that has been said in this opinion that the present act is constitutional in all particulars, and that the court has ample jurisdiction to hear and determine the questions presented in complainant's bill.

This court recognized and applied the act in *Bailey v. Master Plumbers*, 103 Tenn. 100, but its constitutionality was not in that case considered or questioned.

Reverse as to assignments of demurrer sustained by the chancellor, affirm as to those overruled, and remand for further proceedings.

STATUTES—TITLE TO.—A constitutional provision that a bill shall contain but one subject, which shall be expressed in its title, is mandatory: *State v. Tibbets*, 52 Neb. 228, 66 Am. St. Rep. 492. But see the monographic note to *Bobel v. People*, 64 Am. St. Rep. 72. Under such provisions, however, the title to a bill may be general, and need not specify every clause in the proposed statute; it is sufficient if they are all referable to the subject expressed: *State v. Tibbets*, 52 Neb. 228, 66 Am. St. Rep. 492. The title may be as broad and comprehensive, or as narrow and restricted, as the legislature may choose. In the latter case, matter excluded by the restrictive words cannot be inserted in the body of the statute: See the monographic note to *Bobel v. People*, 64 Am. St. Rep. 77, 78.

SPECIAL AND HOSTILE LEGISLATION directed toward corporations is discussed in the monographic note to *St. Louis etc. Ry. Co. v. Paul*, 62 Am. St. Rep. 165-182.

GENERAL AND SPECIAL LAWS are discussed in the monographic note to *State v. Ellet*, 21 Am. St. Rep. 780-789.

ANTI-TRUST LAWS.—THE BASIS of anti-trust statutes is discussed in the monographic note to *Harding v. American Glucose Co.*, 74 Am. St. Rep. 272.

THE RIGHT TO CONTRACT IS BOTH a liberty and property right: *Braceville Coal Co. v. People*, 147 Ill. 66, 37 Am. St. Rep. 206; and any attempt unreasonably to abridge it is opposed to the constitution: *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315. However, the legislature can control to some extent the right to contract in reference to property clothed with a public interest: *Leep v. St. Louis etc. Ry. Co.*, 58 Ark. 407, 41 Am. St. Rep. 109.

STATUTES—CONSTITUTIONALITY OF.—All intendments are in favor of the constitutionality of a statute passed with requisite form and ceremony: *Austin v. State*, 101 Tenn. 563, 70 Am. St. Rep. 708. Every statute must be sustained, unless its conflict with the constitution is beyond reasonable doubt: *State v. Camp Sing*, 18 Mont. 128, 56 Am. St. Rep. 551.

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2. **DOGS—RECOVERY FOR KILLING—PROOF OF VALUE.**—The owner of a dog wrongfully killed may maintain an action to recover therefor, and is not compelled to prove his market value. If the dog has no market value, his owner may prove and recover his special value to him by showing the pedigree, characteristics, and qualities of the dog, and then proving by witnesses who know these things their opinion of his value. (Hodges v. Causey, 525.)

APPEAL.

1. **APPELLATE PRACTICE—FATAL ERROR.**—If it appears to the supreme court that the plaintiff has no cause of action or the defendant no defense which the law can allow to stand, the court must act upon the fatal infirmity presented by the record although no objection was made thereto in the lower court. (Wilson v. Alabama etc. R. R. Co., 543.)

2. **APPELLATE PRACTICE.**—The judgment of the trial court sustaining part and overruling part of the exceptions to the report of a referee based upon conflicting evidence, none of which is preserved in the record, is conclusive and cannot be reviewed on appeal. (Utley v. Hill, 569.)

3. **APPELLATE PRACTICE.—ADMISSION OF INCOMPETENT EVIDENCE** resulting in no injustice, injury, or prejudice is not reversible error. (Railroad v. Wyatt, 926.)

4. **APPELLATE PRACTICE—SERVICE UPON FICTITIOUS DEFENDANTS.**—An appeal need not be dismissed for failure of the appellant to serve notice of appeal upon fictitious defendants, not served with summons, and who made no appearance in the court below. (Benson v. Bunting, 81.)

5. **APPELLATE PRACTICE.—A CLAIM OF RIGHT, PRIVILEGE, OR IMMUNITY** under the constitution of the United States must be asserted and denied in the trial court, or it cannot be considered on appeal. (State v. Schuman, 754.)

6. **APPEAL—RULINGS AS TO EVIDENCE, WITHOUT EXCEPTIONS—REVIEW.**—The correctness of rulings of the trial court, upon matters of evidence, cannot be reviewed on appeal where no exceptions to them have been preserved. (Ebner v. Mackey, 280.)

7. **APPEAL.—AN EXCEPTION TO EVIDENCE** is sufficient when it appears in the statement of the case that objection was made to the evidence when it was offered, that the objection was overruled, and that an exception was then entered. (Jordan v. Greensboro Furnace Co., 644.)

8. **APPEAL—INCOMPETENT QUESTION.—IT IS HARMLESS ERROR** to permit an incompetent question to be asked a witness, where the witness answers that he did not know, since the answer is more favorable to the opposite party than if the question had been excluded, because it prevents any unfavorable inference. (Hendricks v. Western Union Tel. Co., 658.)

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10. **JURISDICTION—APPEAL FROM JUSTICE'S JUDGMENT.** If the superior court, upon appeal from a void justice's judgment, has tried the case and rendered judgment exceeding in amount the statutory limit in the justice's court, the supreme court has jurisdiction of an appeal from that judgment, and such appeal cannot be dismissed for want of jurisdiction. (De Jarnatt v. Marquez, 90.)

11. **APPELLATE PRACTICE—DISMISSAL OF APPEAL.—**The fact that the sureties in an undertaking upon appeal have failed to justify is not ground for dismissing the appeal, nor is the fact that one of the attorneys of appellant is a surety upon such undertaking ground for such dismissal. (De Jarnatt v. Marquez, 90.)

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See False Imprisonment; Railroads, 6.

ASSAULT.

1. **ASSAULT.—FIRING A PISTOL** in the direction of another, within the distance in which it may do execution, with the intention of frightening him, or with the intention of wounding him, are equally assaults. (State v. Baker, 863.)

2. **ASSAULTS ARE ANY UNLAWFUL ATTEMPTS OR OFFERS** with force and violence to do a corporal hurt to another, whether from malice or wantonness. The offense may also consist in putting another in fear of violence. Battery is not a necessary element of assault. (State v. Baker, 863.)

3. **ASSAULT WITH A DANGEROUS WEAPON** is committed whenever such weapon is presented at the person intended to be assaulted within the distance at which it may do execution. Malice is implied from the act. (State v. Baker, 863.)

ASSIGNMENT.

ASSIGNMENT.—WAGES TO BE EARNED UNDER A SUBSISTING CONTRACT may be assigned as against a subsequent garnishment, but the assignment becomes inoperative when the contract of employment on which it rests ceases. Such assignment is not revived by a subsequent return to the employment under a new contract. (*O'Keefe v. Allen*, 884.)

See Judgments, 1, 2; Landlord and Tenant, 3, 4

ATTACHMENT.

1. ATTACHMENT—MORTGAGE SALE—SURPLUS.—Where a creditor of a mortgagor, who has attached his equity of redemption, wishes to protect any interest that he may have in the proceeds remaining in the mortgagee's hands upon a foreclosure sale, he should give due notice to the mortgagee, and the mortgagee is not liable to him for the proceeds after a foreclosure sale, where, without notice of such creditor's claim, he pays the surplus to the mortgagor. (*Hardy v. Beverly Sav. Bank*, 479.)

2. ATTACHMENT AGAINST NATIONAL BANKS.—No attachment can issue from a state court against a national bank, and all of the attachment laws of the several states must be read as if they contained a proviso in express terms that they were not to apply to suits against national banks. (*Dennis v. First Nat. Bank*, 79.)

3. ATTACHMENT—NATIONAL BANKS—POWERS OF CONGRESS.—Congress has power to protect national banks and to regulate their trade and intercourse with others by granting them special immunities, and protecting them against attachment and other proceedings in state courts, by which their efficiency may be impaired. (*Dennis v. First Nat. Bank*, 79.)

4. ATTACHMENT—BOND—RETURN OF GOODS.—If a bond given to release an attachment contains a provision that it shall be void if, at any time after final judgment, the goods, upon request therefor, shall be returned to the officer taking the bond, the possession of an execution upon such judgment is not necessary to enable the officer to demand a return of the property. (*Tucker v. Carr*, 893.)

5. GARNISHMENT OF TRUST FUNDS.—A fund held in trust for another, in which the trustee has no beneficial interest, cannot be attached for the debts of such trustee. (*Palmer v. Northern etc. Assn.*, 503.)

6. GARNISHMENT—FUNDS OF MUTUAL BENEFIT ASSOCIATION.—In an action against a mutual benefit association to enforce a judgment founded upon a claim for a death benefit under a certificate of membership, the plaintiff cannot attach a fund of the association set aside for the payment of death benefits, and paid in by members for that express purpose; the plaintiff's rights as a beneficial owner of such fund can be determined only by a bill in equity. (*Palmer v. Northern etc. Assn.*, 503.)

7. ATTACHMENT—GARNISHMENT.—PROPERTY OUTSIDE OF THE STATE is not the subject of garnishment. To charge a garnishee for the property of the defendant, it is absolutely essential that, at the time of the service of process, he should have it in his possession and within the state. (*Buckeye Pipe Line Co. v. Fee*, 743.)

8. ATTACHMENT—GARNISHMENT—POWER TO ORDER PROPERTY WITHOUT THE STATE TO BE SURRENDERED.—

A court has no jurisdiction, under the process of attachment or garnishment, over property of the defendant outside of the state, and has no power to compel a garnishee, having property of the defendant in his possession without the state, to surrender it into the custody of the court. Hence, an order directing him to make such surrender is without legal effect. (Buckeye Pipe Line Co. v. Fee, 743.)

See Corporations, 26; Suretyship.

ATTORNEYS.

See Executors and Administrators, 6; Negotiable Instruments, 1; New Trial, 2.

AUCTION.

1. AUCTIONS—PUFFERS.—If a person having such control of an auction sale that he can, of his own volition, release a bidder from all responsibility for his bid, employs a person upon that kind of an understanding to bid at the sale without disclosing for whom he is bidding, for the purpose of preventing the property from selling at a sacrifice, or for the purpose of making it bring more than its actual value, the bidding under such employment is such a fraud upon the real bidders that the sale may be declared void at their instance. The only way for such person to prevent a sacrifice of the property sold is to fix a minimum price of which public notice is given, or make public the fact that he, prevent a sacrifice of the property sold is to fix a minimum price either by himself or others, will be a bidder at the sale. (McMillan v. Harris, 93.)

2. AUCTIONS—PUFFERS.—The mere fact that a person is interested in the property to be sold at auction, or in the proceeds of such sale, does not preclude him from either bidding himself or from procuring another to bid openly or secretly, in his behalf, without regard to what the agreement may be with such bidder, if the one employing such bidder has not himself such control of the sale that he could absolutely release the bidder from all responsibility growing out of his having participated in the sale in that capacity. (McMillan v. Harris, 93.)

3. AUCTIONS—JUDICIAL SALES—PUFFING.—A person who is entitled to the proceeds of a judicial sale of land by an executor may engage a third person to bid the property up to a specified price, with an agreement that if it is sold to such bidder, the person who thus employs him will take it off his hands. (McMillan v. Harris, 93.)

BAILMENT.

See Larceny.

BANKRUPTCY.

1. BANKRUPTCY PROCEEDINGS—EFFECT ON PENDING SUIT—SPECIAL JUDGMENT.—A court in which a suit against a bankrupt is pending is not, after the adjudication of bankruptcy, bound to stay further proceedings therein, though it may do so if justice so requires; the action is not absolutely barred, and the court has power to proceed to judgment. Hence, if after verdict and before judgment, the defendants are adjudicated bankrupts under the United States bankruptcy act, and thereafter they file a suggestion of that fact and move that all proceedings be stayed, the court has power to deny such motion and to direct the entry of a

special judgment to enable the plaintiff to proceed against the sureties upon a bond to dissolve an attachment, given more than four months before the bankruptcy. (*Rosenthal v. Nove*, 512.)

2. **BANKRUPTCY COURT—EXAMINING DEFENDANTS LIABILITY IN, AFTER VERDICT.**—If, before the commencement of bankruptcy proceedings, in which the defendants are adjudged bankrupts, the right of a plaintiff to recover of the defendants a definite amount of damages has been fixed by the verdict of a jury, such right and liability cannot be re-examined in the bankruptcy court. (*Rosenthal v. Nove*, 512.)

3. **BANKRUPTCY—PREFERENCES.**—A judgment on a warrant of attorney to confess it, entered within four months of the filing of a petition in bankruptcy, is, regardless of the date of the warrant of attorney, within the meaning of a bankruptcy statute declaring that the holder cannot avail himself of a lien obtained by a judgment by confession "begun" against a person within four months before the filing of his petition in bankruptcy, if the lien was obtained while such person was insolvent. In such case it is not the date of the warrant of attorney authorizing the entry of judgment, but the date on which the judgment was actually entered that fixes the time from which the four months' period begins to run. (*Ferguson v. Greth*, 812.)

See *Insolvency; Insurance*, 7.

BANKS AND BANKING.

1. **BANKS—ASSIGNMENT OF FUND.**—A "CASHIER'S CHECK," given to a depositor, to cover the amount of a withdrawal, is merely an acknowledgment of an indebtedness on the part of the bank to the payee of the order. The change thereby made is not in the nature of the debt, but in the evidence of it. Hence such a check is not an assignment to the depositor of the amount therein specified, as against a receiver taking possession of the property of the bank, by order of court, before the check is presented to it for payment. (*Clark v. Chicago Title etc. Co.*, 294.)

2. **BANKS AND BANKING.—THE RELATION OF DEPOSITORS** to a bank is that of ordinary debtor and creditor. It is a relation of contract and not of trust. (*Utley v. Hill*, 569.)

3. **BANKS AND BANKING—RELATION OF DIRECTORS TO DEPOSITORS.**—Ordinarily, there is no relation either of contract or trust between the creditor of a bank and the directors thereof. (*Utley v. Hill*, 569.)

4. **BANKS AND BANKING—INSOLVENCY—LIABILITY OF DIRECTORS.**—The directors of a bank who assent to the reception of deposits after they have knowledge that the bank is insolvent or in failing circumstances are not individually liable to depositors therefor, unless they had actual knowledge of such insolvency, and the mere failure or neglect on their part to investigate the affairs of the bank does not render them thus liable nor estop them from pleading ignorance of the financial condition of the bank. (*Utley v. Hill*, 569.)

5. **BANKS AND BANKING—INSOLVENCY—KNOWLEDGE OF LIABILITY OF DIRECTORS.**—"Actual knowledge" of the insolvent condition of a bank, required of its directors in order to hold them personally liable to depositors for deposits received while the bank is in that condition, means a guilty knowledge, and not an innocent, bona fide ignorance arising from neglect on their part to inquire into the financial condition of the bank. (*Utley v. Hill*, 569.)

6. BANKS AND BANKING—INSOLVENCY—LIABILITY OF DIRECTORS—FALSE STATEMENT OF FINANCIAL CONDITION.—The directors of an insolvent bank are not personally liable to depositors in a common-law action of deceit for a false statement of the financial condition of the bank made under a statutory requirement, when such statement is honestly believed to be true, and made in good faith, based upon details furnished by the cashier of the bank whose reputation is good. (*Utley v. Hill*, 569.)

See Attachment, 2, 8; Husband and Wife, 2, 8; Setoff, 1-3.

BASTARDY.

CONSTITUTIONAL LAW—IMPRISONMENT FOR DEBT—BASTARDY PROCEEDINGS.—A judgment in bastardy proceedings that the father of an illegitimate child be required to maintain or support it, and in default thereof be committed to jail, is in the nature of a penalty and in no sense a judgment for debt within a constitutional prohibition against imprisonment for debt. (*Ex parte Bridgforth*, 532.)

BENEFIT SOCIETY.

See Insurance, 1-6.

BICYCLE.

See Highways, 5-10.

BLASTING.

See Master and Servant, 6.

BOARD OF HEALTH.

1. HEALTH AND QUARANTINE.—ORDERS OF BOARDS OF HEALTH must stand the test of reasonableness, and whether they are responsible or not is for the court to determine. (*Wilson v. Alabama etc. R. R. Co.*, 543.)

2. HEALTH AND QUARANTINE—ORDERS OF BOARDS OF HEALTH, WHEN UNREASONABLE.—An order of a board of health prohibiting all persons from getting off trains and boats at any point within the state, because "there is yellow fever at several places along the coast in this state, and several cases of yellow fever and reported suspected cases at various other places throughout the state," is unreasonable and void. (*Wilson v. Alabama etc. R. R. Co.*, 543.)

3. HEALTH AND QUARANTINE—ORDERS OF BOARDS OF HEALTH—REASONABLENESS.—An order of a board of health that no person who has been exposed to infection, or who has come from an infected point, or who is destined for an infected point, shall be allowed to come into the state, is reasonable and valid; but an order that no person whomsoever shall be allowed to get off of a train of cars or a boat anywhere within the state is unreasonable and void. (*Wilson v. Alabama etc. R. R. Co.*, 543.)

4. HEALTH AND QUARANTINE—LIABILITY OF RAILROADS.—A railroad company must take the risk of the validity of a quarantine order of a board of health, when it yields to such order alone, and when its defense is not that it yielded because only of the order, but because also of vis major, its defense is maintained if it

appears that such was major or uncontrollable necessity was the real cause of its action. (*Wilson v. Alabama etc. R. R. Co.*, 542.)

See *Municipal Corporations*, 4; *Officers*, 12; *Police Power*, 4, 5.

BONDS.

See *Attachment*, 4; *Officers*, 4-8; *Replevin*, 2-5; *Suretyship*.

BREACH OF PROMISE.

See *Marriage and Divorce*, 4-6.

BURGLARY.

1. **BURGLARY—LARCENY—AVERMENT OF OWNERSHIP.**—Under an indictment charging burglary with larceny, the averment of ownership in the part of the indictment charging the larceny is surplusage after conviction of the burglary, and may be rejected. (*James v. State*, 527.)

2. **BURGLARY—PROOF OF OWNERSHIP AND CORPORATE EXISTENCE.**—Under an indictment for burglary, it is necessary to aver and prove the ownership of the premises burglarized. If it is averred to be the property of a corporation, as a railway car, the corporate existence must be proved. (*James v. State*, 527.)

CARRIERS.

1. **CARRIERS OF LIVESTOCK—NEGLIGENCE—PROOF BY PLAINTIFF.**—In an action to recover for injuries to cattle resulting from delay in transportation, the plaintiff's case is fully made out when he has shown that the cattle were received by the carrier, and not seasonably and safely delivered—that is, not delivered at all, or delivered in a damaged condition, and after an unreasonable delay. (*Hinkle v. Southern Ry. Co.*, 685.)

2. **CARRIERS OF LIVESTOCK—WRITTEN NOTICE OF CLAIM FOR DAMAGES.**—A stipulation in a contract for the carriage of livestock that the shipper shall give written notice of any loss he may suffer or intention to demand compensation is not to relieve the carrier from just liability, but is to give it such notice that it can protect itself; hence where a shipper, upon receiving cattle in a damaged condition, signs a receipt under protest, this constitutes sufficient notice to the carrier that the shipper intends to enforce his rights. (*Hinkle v. Southern Ry. Co.*, 685.)

3. **CARRIERS—SPECIAL CONTRACT—BURDEN OF PROOF.** If a carrier, to escape any part of its common-law liability, relies upon a special contract, the burden rests upon it to affirmatively prove such contract, and to bring the injury clearly within the terms of its exemption. (*Hinkle v. Southern Ry. Co.*, 685.)

4. **CONNECTING CARRIERS—LIABILITY—BURDEN OF PROOF.**—Among connecting lines of common carriers, that one in whose hands goods are found damaged is presumed to have caused the damage, and the burden is upon it to rebut the presumption. (*Hinkle v. Southern Ry. Co.*, 685.)

5. **CARRIERS—SPECIAL CONTRACT—EFFECT.**—While a common carrier may limit its liability to a certain extent by special contract, it does not thereby change its character and become a private carrier for hire. (*Hinkle v. Southern Ry. Co.*, 685.)

6. **CARRIERS—SPECIAL CONTRACT—CONSTRUCTION.**—A special contract, limiting the liability of a common carrier, being in

derogation of common law, is strictly construed, and is never enforced unless shown to be reasonable. (*Hinkle v. Southern Ry. Co.*, 885.)

See Damages, 2, 5; Interest, 4; Railroads.

BURIAL RIGHTS.

See Cemetery.

BURNING HOUSE.

See County, 1, 2; Municipal Corporations, 5.

CHECK.

See Banks; Negotiable Instruments.

CEMETERY.

1. CEMETERIES—BURIAL LOTS.—While a burial lot is regarded as property, the title to which in most cases descends to the heirs, the tenure is generally unlike that of ordinary real estate. (*Gardner v. Swan Point Cemetery*, 897.)

2. CEMETERIES—BURIAL LOTS.—Though a deed to a cemetery lot may run to the grantee, his heirs and assigns, he takes only an easement or right of burial, rather than an absolute title, and so long as the land is used for burial purposes he cannot exercise the same rights of ownership as in other real estate. (*Gardner v. Swan Point Cemetery*, 897.)

3. CEMETERIES—BURIAL RIGHTS.—Buried human bodies must remain undisturbed, and the right and duty falls to the next of kin to see that such repose is duly protected and preserved. (*Gardner v. Swan Point Cemetery*, 897.)

4. CEMETERIES—BURIAL RIGHTS.—Burial of a human body by the consent of those most interested is regarded in law as a final sepulture, which cannot be disturbed against the will of those who have the right to object, generally the next of kin, on account of change in feeling or circumstances. (*Gardner v. Swan Point Cemetery*, 897.)

5. CEMETERIES—BURIAL LOTS—BURIAL RIGHTS.—A deed to a cemetery lot, merely reserving to the grantee the right of burial therein, must be construed to mean the right of burial in a part of the lot vacant at the time of the execution of the deed, and neither the grantor nor the grantee has the right to thereafter dig up and remove a body already buried there for the purpose of creating such vacancy. (*Gardner v. Swan Point Cemetery*, 897.)

CONFLICT OF LAWS.

1. DAMAGES—CONFLICT OF LAWS.—A claim for damages *ex delicto* arising from a tort or trespass upon the person of a married woman while temporarily sojourning in one state, and whose matrimonial domicile is in another state, cannot be considered as community property acquired in the former state; and if she has full capacity to institute suit in her own name and recover judgment for such damages in the courts of the state of her domicile, she also has capacity to sue therefor in her own name in the state where the injury is received. (*Williams v. Pope Mfg. Co.*, 890.)

2. TRESPASS—TRANSITORY ACTION.—The cause of action on a tort or trespass is transitory and follows the offending party,

whether a corporation or a natural person, into any jurisdiction wherein he may be found, and the right of action being personal to the complainant, he may bring it in any court that he may select. (Williams v. Pope Mfg. Co., 390.)

See Attachment, 7, 8; Corporations, 19-26; Executor and Administrator, 8; Interpleader; Judgment, 4; Jurisdiction, 1; Limitation of Actions, 2, 8; Taxes, 2.

CONSTABLE.

See Officers, 7, 8.

CONSTITUTION.

CONSTITUTIONAL LAW.—DUE PROCESS OF LAW means a course of legal proceedings according to rules and principles under an established system of jurisprudence for the protection and enforcement of private rights, requiring a court of competent jurisdiction to pass upon the subject matter of the proceedings and a trial or proceeding in which the rights of the parties, after notice and opportunity to be heard, shall be duly adjudicated. (Carr v. Brown, 855.)

CONSTITUTIONAL LAW.

See Bastardy; Contempt, 3; Executors and Administrators, 2; Insurance, 19; Interstate Commerce, 2-4; Mobs; Police Power; Railroads, 8; Statutes.

CONTEMPT.

1. CONTEMPT.—THE POWER to punish for contempts is inherent in every court of justice. (Bradley v. State, 157.)

2. CONTEMPT—POWER OF COURTS—LEGISLATIVE ABRIDGMENT.—Where a court is established by the constitution, the legislature has no right, without express constitutional authority, by defining what are contempts, to limit such court to treating as contempts such acts only as are embraced in the legislative definition. (Bradley v. State, 157.)

3. CONTEMPT—POWER OF LEGISLATURE.—A CONSTITUTIONAL PROVISION which says that "the power of the courts to punish for contempts shall be limited by legislative acts," empowers the legislature simply to fix the limit of the punishment which the courts could inflict for contempts, and does not authorize such body to limit the inherent power of courts to decide what are contempts and to punish for contempts. Hence, an act which seeks to limit the jurisdiction of a constitutional court to punish contempts to certain specified acts is not binding on such courts. (Bradley v. State, 157.)

4. CONTEMPT—POWER OF COURT—INDICTABLE OFFENSE.—That a given act is indictable under the penal laws of a state does not deprive a court of the power of punishing such act as a contempt. (Bradley v. State, 157.)

CONTRACT.

1. CONTRACTS—QUANTUM MERUIT.—If labor and materials are furnished by request and no price is agreed upon, the law implies an agreement to pay the reasonable value thereof, but if the parties have by express agreement fixed the amount to be paid upon the completion and fulfillment of the contract, they must be

governed thereby, and, in a suit on the contract, a court on quantum meruit cannot avail. (Nordyke etc. Co. v. Kehlor, 600.)

2. **CONTRACTS—INTENTION—DOUBTFUL TERMS.**—The circumstances under which a contract is made and the object in view must be considered in giving meaning to its doubtful terms. (Nordyke etc. Co. v. Kehlor, 600.)

3. **CONTRACTS—OPTIONS—JOINT OR SEVERAL.**—An option for a certain period to purchase a business and its goodwill, containing an agreement not to engage in a competitive business within certain limits of space and time and signed with the firm name, and having a renewal of the option to purchase attached thereto and made part thereof, and signed by all of the members of the firm giving the original option, constitutes a joint and several undertaking not to engage in a competitive business binding on such firm and each of its members. (Trenton Potteries Co. v. Oliphant, 612.)

4. **CONTRACTS—RESTRAINT OF TRADE.**—A contract that the vendor of a business and its goodwill will not engage in a competitive business, though in restraint of trade, is not invalid, when such restraint is not general but partial, and no more extensive than is reasonably required to protect the purchaser in the use and enjoyment of the business purchased, and not otherwise injurious to the public interest. (Trenton Potteries Co. v. Oliphant, 612.)

5. **CONTRACTS—RESTRAINT OF TRADE.**—The test of the validity of contracts in restraint of trade is to be found alone in their being reasonably essential to the protection of the purchaser, and there are at the present day trades in which a general restraint cannot be held to be unreasonable. (Trenton Potteries Co. v. Oliphant, 612.)

6. **CONTRACTS IN RESTRAINT OF TRADE—AREA COVERED.**—A contract that the vendor of a business and its goodwill will not engage in the same business "within any state of the United States," except certain named states, "for the period of fifty years," includes any and all states not specifically excepted, and is enforceable in those of them only in which the business purchased has been carried on, and within which the restraint contracted for is reasonably required by the vendee for his protection in the use and enjoyment of such business. Such contract does not cover states in which the business purchased has never been carried on and to which it might be extended. In such states the contract is not enforceable. (Trenton Potteries Co. v. Oliphant, 612.)

7. **CONTRACTS IN RESTRAINT OF TRADE—PERIOD OF TIME.**—A contract that the vendor of a business and its goodwill shall not engage in the same business for the period of fifty years, which is the period of the corporate existence of the purchaser, is not unreasonable as to the limitation of time. (Trenton Potteries Co. v. Oliphant, 612.)

See Damages, 1; Infants, 1-3; Master and Servant, 5; Mistake, 2-5; Municipal Corporations, 1; Usury.

CONTRIBUTION.

See Partnership, 1, 3; Suretyship, 4, 5.

CORPORATIONS.

1. **CORPORATIONS—"PERSON."**—If constitutional provisions guarantee to "persons" the enjoyment of property, or afford to them means for its protection, or prohibit legislation injuriously affecting

it, the benefits of such provisions extend to corporations, and the courts may always look beyond the name of the artificial being to the individuals whom it represents. (*Johnson v. Goodyear Mfg. Co.*, 17.)

2. CORPORATIONS MAY LAWFULLY DO ANY ACTS within the corporate powers conferred upon them by legislative grant. (*Trenton Potteries Co. v. Oliphant*, 612.)

3. CORPORATIONS—RIGHT TO SUE.—A corporation formed to manufacture lumber and erect buildings may take an assignment of a judgment and sue thereon. (*Capital Lumbering Co. v. Learned*, 792.)

4. CORPORATIONS CREATED FOR THE TRANSACTION OF CERTAIN SPECIFIED BUSINESS may invoke any legal or equitable remedy available to an individual under similar circumstances. (*Capital Lumbering Co. v. Learned*, 792.)

5. CORPORATIONS.—A CONTRACT OF SUBSCRIPTION, for the purpose of effecting an incorporation, is binding and enforceable only after the full capital stock has been subscribed. (*McCoy v. World's Columbian Exposition*, 288.)

6. CORPORATIONS — FULL SUBSCRIPTION — EVIDENCE OF.—THE RECORDS of a corporation are competent and sufficient evidence that the full amount of capital stock has been subscribed. Hence a final certificate of incorporation, with the proceedings attached thereto, is prima facie proof of that fact. (*McCoy v. World's Columbian Exposition*, 288.)

7. CORPORATIONS—SUIT ON SUBSCRIPTION — UNAUTHORIZED SUBSCRIPTION BY OTHER CORPORATIONS AS A DEFENSE.—The fact that corporations, without authority, subscribed for the capital stock of another corporation, and against which they could make a defense, does not enable an individual subscriber to evade his own subscription, where he, during the whole proceedings to effect the incorporation, made no objection to any subscription by such corporations, or effort to repudiate his own on that account, and where there is no evidence that the contracts of subscription by the corporations were not performed, or that they had availed themselves of their privilege to deny or repudiate their obligations. (*McCoy v. World's Columbian Exposition*, 288.)

8. CORPORATIONS—SUIT ON SUBSCRIPTION—INCREASE OF STOCK AS A DEFENSE.—It is no defense in a suit upon a subscription for capital stock, made in anticipation of the organization of a corporation, that the capital stock was increased, and that there is no proof that the additional stock was subscribed. (*McCoy v. World's Columbian Exposition*, 288.)

9. CORPORATIONS—SUIT ON SUBSCRIPTION—EVIDENCE — JUDICIAL NOTICE.—A court will take judicial notice of historical facts of public notoriety, such as the fact that the World's Fair was held in the city of Chicago. Hence in a suit on a subscription to the capital stock of the "World's Columbian Exposition," a corporation, a compliance with the condition that the exposition should be located in that city need not be proved. (*McCoy v. World's Columbian Exposition*, 288.)

10. CORPORATIONS—INTEREST ON SUBSCRIPTIONS FROM CALL OR DEMAND.—A subscription, in writing, to the capital stock of a corporation, payable in installments, as called for by the directors, matures upon their call or demand, and thereafter draws interest. (*McCoy v. World's Columbian Exposition*, 288.)

11. CORPORATIONS—INSPECTION OF BOOKS AND RECORDS—SUFFICIENCY OF PETITION FOR.—It is not necessary for a stockholder in a corporation, who demands an inspection of its books and records, to state in his petition what his reasons are for desiring it, or to show that he is actuated by proper motives and in the pursuit of justifiable ends. It is sufficient for his petition to show that he is a stockholder; that he has requested such inspection to be made at a reasonable time; and that his request has been refused. (*Cincinnati etc. Co. v. Hoffmeister*, 707.)

12. CORPORATIONS—RIGHT TO INSPECT BOOKS AND RECORDS—INCIDENTS OF.—The right of a stockholder to take copies of the books and records of a corporation is incidental to his right to inspect them, and such rights may be exercised by the stockholder himself or by his agent. Furthermore, the right of inspection is not limited to one inspection, but may be exercised, at any reasonable time, so long as the relation of stockholder exists. (*Cincinnati etc. Co. v. Hoffmeister*, 707.)

13. CORPORATIONS—INSOLVENCY—ASSESSMENTS UPON TRANSFERRING STOCKHOLDERS—HOW TO BE APPLIED AMONG CREDITORS.—If a solvent stockholder of a corporation transfers his shares, in good faith, to one who is insolvent at the time when the stockholders' liability is subjected to the payment of debts, a fund derived from assessments levied upon such transferring shareholders must be applied exclusively to the payment of creditors whose claims existed at the time of such transfer. It cannot go into a common fund to be distributed pro rata among all the creditors of the corporation. No part thereof should be applied to debts of the company contracted subsequently to the date of such transfer. (*Wick Nat. Bank v. Union Nat. Bank*, 734.)

14. CORPORATIONS—INSOLVENCY—ENFORCING STATUTORY LIABILITY OF TRANSFERRING STOCKHOLDERS—PROPER DISTRIBUTION AMONG CREDITORS.—In a suit to enforce the statutory liability of stockholders of an insolvent corporation, the rule for determining to whom the money shall be paid is, that, as to a fund arising from assessments upon all who are stockholders at the time of the decree enforcing such liability, all the creditors should share pro rata; but as to funds arising from assessments upon persons who were stockholders, but who assigned their stock, in good faith, before the insolvency of the corporation, such funds should be applied to the residue, if any, owing to creditors who were such at the time of the assignment of the stock. (*Wick Nat. Bank v. Union Nat. Bank*, 734.)

15. CORPORATIONS—CHANGE OF PARTNERSHIPS INTO—EFFECT OF, UPON DEBTS.—If, for the purpose of continuing a business, it is changed from a partnership to a corporation, the latter taking all the property of the partnership, by the members of the firm transferring their respective interests therein to the corporation, and receiving a like interest in the capital stock of the company in consideration of the transfer, and the parties remain the same, the debts of the firm become the debts of the corporation, which is answerable therefor, whether it has expressly assumed them or not. Such a transaction is not a sale of property by one to another. The corporation cannot retain the property and repudiate the liability. (*Andres v. Morgan*, 712.)

16. DEBTOR AND CREDITOR—CHANGE OF PARTNERSHIP INTO CORPORATION—NOVATION—WHAT IS NOT.—If the members of a partnership contemplate changing the business into a corporation, for the purpose of continuing it, without a change of parties, and a member of the firm assumes one of its debts to a creditor in discharge of a debt of his own to the company, the

transaction does not constitute a novation as to the firm creditor, where he had no knowledge of it and never assented to it, and does not in any way affect his rights as a creditor of the corporation. As between such member and the corporation, it is the debt of the former, but as between the firm creditor and the corporation, it is the debt of the latter. (Andres v. Morgan, 712.)

17. CORPORATIONS—CHANGE OF PARTNERSHIPS INTO—CHANGE OF STOCKHOLDERS—RIGHTS OF CREDITORS.—The rights of a creditor of a partnership, when it becomes a corporation, cannot be altered by subsequent changes in the stockholders. The latter may wholly change and the company remain the same as to rights and liabilities. (Andres v. Morgan, 712.)

18. EVERY CORPORATION HAS POWER TO MAKE A NOTE to secure the payment of its own debt. (Andres v. Morgan, 712.)

19. CORPORATIONS.—FOREIGN CORPORATIONS HAVE NO ABSOLUTE RIGHT to recognition in the state. They may be admitted on such terms and conditions as the state may impose, or they may be excluded altogether. (State v. Schlitz Brewing Co., 941.)

20. CORPORATIONS, FOREIGN—NONCOMPLIANCE WITH STATUTE—RIGHT TO SUE.—A foreign corporation which has failed to comply with a statute requiring it to appoint a resident of the state as its attorney, upon whom service of process against it may be made, and providing a penalty for noncompliance, may nevertheless maintain a suit within the state to recover a just debt due it from a resident thereof. (Garratt Ford Co. v. Vermont Mfg. Co., 852.)

21. CORPORATIONS—FOREIGN—CONFLICT OF LAWS.—Judgments of a court of one state cannot determine the validity of a mortgage on land in another state, nor transfer the title to land in that state, and it can make no difference that one of the parties to such judgment is a corporation formed in the former state, and doing business in the latter state. (Union Nat. Bank v. State Nat. Bank, 560.)

22. CORPORATIONS, FOREIGN—CONFLICT OF LAWS—CAPACITY TO HOLD LAND.—The capacity of a foreign corporation to acquire and hold land, as well as the validity of its mortgage thereon, must be determined by the courts of the state where the land is situated, and cannot be determined by the courts of the state where such corporation is organized. (Union Nat. Bank v. State Nat. Bank, 560.)

23. CORPORATIONS, FOREIGN—EXECUTION OF MORTGAGE—CORPORATE ACT—CONFLICT OF LAWS.—If the majority of the directors of a corporation hold a meeting in a state other than that in which the corporation is organized, and execute a mortgage on land in that state to a bona fide creditor therein, such act is a corporate act and void, when the charter of the corporation provides that the action of any meeting of its directors held beyond the limits of the state shall be void unless such meeting is authorized or its acts ratified by two-thirds of the directors at a regular meeting, the action in executing such mortgage is neither thus authorized nor ratified. (Union Nat. Bank v. State Nat. Bank, 560.)

24. CORPORATIONS, FOREIGN—EXECUTION OF VOID MORTGAGE—CONFLICT OF LAWS.—If a mortgage executed by a corporation in a state other than that in which it is organized is void because not executed in accordance with its charter, it is not legalized in the state wherein the land is situated by the fact

that the corporation was organized to do business in that state, that it conveyed all of its property therein to secure a bona fide creditor therein, and that the mortgage was thus made to enable the corporation to pay its debts and carry on its business in that state. (Union Nat. Bank v. State Nat. Bank, 560.)

25. CORPORATIONS—FOREIGN—CONFLICT OF LAWS.—Although a state may impose such terms and restrictions as it may see fit upon foreign corporations doing business therein or exclude them entirely, yet such corporations cannot transact corporate business in such state in any other manner than that prescribed by its charter. Hence, a mortgage executed by such corporation in such state in violation of the charter under which it was organized is void. (Union Nat. Bank v. State Nat. Bank, 560.)

26. CORPORATIONS, FOREIGN—ATTACHMENT—COLLATERAL ATTACK—FRAUD.—The defense that a foreign corporation defendant in an attachment suit has its chief place of business within the state, and that ordinary legal process could have been served upon it therein, must, in the absence of fraud, be pleaded to the attachment, and cannot be raised in a collateral proceeding unless fraud is pleaded and proved. (Union Nat. Bank v. State Nat. Bank, 560.)

See Banks, 3-6; Burglary, 2; Equity, 2; Injunction, 2; Insurance, 19; Monopoly, 1, 2; Receiver; Statutes, 9-11.

COTENANCY.

1. COTENANCY—JOINT OWNERSHIP.—A statutory provision that a right created in favor of several persons is presumed to be joint and not several, unless overcome by express words to the contrary, has reference only to the relation between the parties in whose favor the right is created, and the party against whom it exists, and does not determine the relation of joint interest and benefit of survivorship as between the owners of the right in their relations to one another. (Denigan v. San Francisco Sav. Union, 35.)

2. COTENANCY—TRESPASS—DAMAGES—JOINT RIGHTS.—The right of action of cotenants for a trespass on their land is joint and whatever affects the right of one to recover in like manner affects them all. The quantum of damages which any one of them may recover is the quantum to which each of the others is limited. The assessment of damages must be joint, and cannot be severed by the jury. (Haley v. Taylor, 549.)

See Trespass, 2.

COUNTY.

1. COUNTIES — LIABILITY FOR BURNING HOUSE.—A county is not liable to a plaintiff in tort for the burning of his house, in the absence of statute imposing such liability, either expressly or by necessary implication. (Prichard v. Board of Commissioners, 679.)

2. COUNTIES — DEALING WITH SMALLPOX — BURNING HOUSE.—Under statutes conferring power to make regulations to prevent the spread of contagious and infectious diseases, and to destroy such furniture or other articles which shall be believed to be tainted or infected with such diseases, neither a town nor county has authority to burn a residence house to prevent the spread of such diseases. A proper disinfection would be the extent of their powers in respect to property thus tainted or infected. (Prichard v. Board of Commissioners, 679.)

3. COUNTIES AS MUNICIPAL CORPORATIONS—LIABILITY.—Counties are not, in a strict legal sense, municipal corporations, but are rather instrumentalities of government, with corporate powers to execute their purposes, and they are not liable in damages, in the absence of statutory provisions giving a right of action against them. (*Prichard v. Board of Commissioners*, 679.)

4. LIMITATION OF ACTION AGAINST COUNTY.—A county owning land which it may sell and convey without a breach of duty, holds it as an individual, and its title may, therefore, be defeated by possession, and payment of taxes, under color of title, made in good faith, for the period prescribed by the statute of limitations. (*Hammond v. Shepard*, 274.)

COVENANTS.

1. RESTRICTIVE COVENANTS—ENFORCEMENT OF.—The right of grantees from a common grantor to enforce, inter sese, covenants entered into by each with such grantor is confined to cases where there is proof of a general plan or scheme for the improvement of property, and its consequent benefit, and there is evidence of the covenant in question having been entered into for the benefit of other lands conveyed by the same grantor. Such covenants cannot be enforced by a plaintiff against a defendant, between whom there is no privity, either of contract or estate. (*Summers v. Beeler*, 446.)

2. RESTRICTIVE COVENANTS AS TO BUILDING LINE—ENFORCEMENT OF, BY PURCHASERS INTER SESE.—If some lots of a platted tract of land in a city are conveyed by the owner without any restriction as to a building line, while others conveyed by the same grantor do have such a restriction the grantees of the latter lots cannot enforce such restriction inter sese, without showing that it was part of a general scheme for the benefit of all the purchasers. (*Summers v. Beeler*, 446.)

3. RESTRICTIVE COVENANTS AS TO BUILDING LINE—ENFORCEMENT OF, BY PURCHASERS INTER SESE—BAY-WINDOW—INJUNCTION.—If, after certain lots of a platted tract of land in a city are conveyed by the owner, some with restrictions to be observed as to a building line, and others with no such restrictions, one lot is conveyed with such a restriction, but with no servitude imposed by the deed on an adjacent lot, facing the same street, retained by the grantor, and such adjacent lot is afterward sold by the same grantor, with a like restriction, the grantee of the former lot cannot restrain the grantee of the latter lot from building a bay-window beyond the building line, where there was nothing in the recorded map, or in the description of the lots accompanying it, showing any restriction, and where such restrictions in the deeds to prior purchasers were treated by them, both by their own violations thereof and their failure to resist violations by other purchasers, as not made for the common benefit of all the purchasers. (*Summers v. Beeler*, 446.)

See Deeds, 1.

CREDITOR'S BILL.

1. CREDITORS' BILLS TO SET ASIDE fraudulent conveyances and bills to reach equitable assets rest upon distinct grounds of jurisdiction, as the former invokes the aid of the court for relief from fraud, and the latter for the appropriation of assets which cannot be reached by law. Both kinds of bills are, however, proceedings in equity, and subject to the same general rules. (*First Nat. Bank v. Randall*, 867.)

2. CREDITORS' BILLS TO REACH EQUITABLE ASSETS CANNOT STAND until legal remedies have been exhausted, and the complainants' rights as creditors have been established in the jurisdiction where the equitable remedy is sought. (*First Nat. Bank v. Randall*, 867.)

3. CREDITOR'S SUIT.—THE FEES AND COMPENSATION OF AN EXECUTOR OR ADMINISTRATOR cannot be reached by a creditor during the administration of the estate and before they have been allowed by the probate court. (*Overturf v. Gerlach*, 704.)

See *Fraudulent Conveyance*, 3.

CRIMINAL LAW.

See *Appeal*, 12; *Pleading*, 7-10.

CROPS.

1. GROWING CROPS FORM A PART OF THE REAL ESTATE to which they are attached and follow the title thereto. (*Wootton v. White*, 425.)

2. CROPS ON MORTGAGED PREMISES—SEVERANCE.—If a crop is growing upon mortgaged premises, the mortgagor cannot, by executing a bill of sale thereof, defeat the mortgagee's right to sell the crop on foreclosure, or the right of the purchaser at such a sale to claim the crop. A bill of sale does not work a severance of the growing crop. (*Wootton v. White*, 425.)

3. CROPS ON MORTGAGED PREMISES—FORECLOSURE BEFORE SEVERANCE—OWNERSHIP.—If a crop is growing upon mortgaged premises, and the mortgagor gives a bill of sale thereof to a third person, but the premises are sold under foreclosure proceedings before the crop is actually severed from the land, such crop passes to the purchaser. (*Wootton v. White*, 425.)

DAMAGES.

1. CONTRACTS—VOID—DAMAGES FOR BREACH.—An action cannot be maintained for damages for the breach of a void contract. (*Jordan v. Greensboro Furnace Co.*, 644.)

2. CARRIERS—NEGLIGENT DELAY—MEASURE OF DAMAGES.—A carrier requested to ship promptly, and notified that the goods are designed to fill a "penalty contract," is liable for such special damages to the shipper as arise from negligent delay in the transportation and delivery of the goods. (*Railroad v. Cabinet Co.*, 933.)

3. CARRIERS—NEGLIGENT DELAY—MEASURE OF DAMAGES.—If property is shipped to market for general sale to such purchasers as may be obtained, and the carrier unreasonably and negligently delays the transportation, the measure of damages is the depreciation in the salable quality and market value of the property at the place of destination between the time when it should have arrived and when it did in fact arrive. (*Railroad v. Cabinet Co.*, 933.)

4. CARRIERS—NEGLIGENT DELAY—MEASURE OF DAMAGES.—If property is sold at an advantageous price before shipment, on condition that it be delivered by a certain time, and the carrier, with knowledge of that fact, undertakes the transportation, and, through negligence, fails to make the delivery in time, and the conditional purchaser declines to receive the property on account of the delay, the liability of the carrier is measured by the

difference between the market value of the property when it arrived at its destination and the price at which it was conditionally sold before shipment. (Railroad v. Cabinet Co., 933.)

5. CARRIERS—NEGLIGENT DELAY—MEASURE OF DAMAGES.—If the intended use and application of the goods to be carried are expressly brought to the carrier's notice at the time they are received, or could be reasonably inferred from known circumstances, so that the special use or application may be fairly considered to be within the contemplation of both parties, the consignor is entitled to recover the damages naturally resulting from his being unable to use or apply the goods owing to the negligent delay of the carrier in transporting and delivering them. (Railroad v. Cabinet Co., 933.)

6. CONTRACTS—PENALTY—LIQUIDATED DAMAGES.—If a contract is for a matter of uncertain value, and a reasonable sum is fixed by the parties as the amount to be paid on a breach, that sum, though called a penalty in the instrument, is recoverable as liquidated damage if the obligation is not in fact performed. If, however, the sum named is not reasonable, it must be treated as a penalty and its enforcement refused. (Railroad v. Cabinet Co., 933.)

See Conflict of Laws, 1; Eminent Domain, 1-3; Husband and Wife, 6, 7; Interest, 4.

DAY.

See Time, 1.

DEADLY WEAPON.

See Assault; Homicide.

DEATH.

See Agency; Execution, 2; Judgment, 2.

DEBTOR AND CREDITOR.

See Bankruptcy; Insolvency.

DEEDS.

1. DEEDS—COVENANTS, WHEN PERSONAL.—A covenant in a deed to a railroad company agreeing to build a fence along the railroad, or not to hold the company liable "for any damage done to stock belonging to us," omitting the word "assigns," is personal to the grantors, and does not run with the land nor bind tenants or other successors in interest. (Brown v. Southern Pac. Co., 761.)

2. CONVEYANCE, WHETHER DEED OR WILL.—A written instrument in form of a deed conveying a present interest in land to the children of the grantor, but attempting to postpone their enjoyment of the estate until after his death, and subsequently treated by the parties as a deed, must be construed as such, and not as an instrument testamentary in character. (Love v. Blauw, 834.)

See Covenants, 1-3; Dower, 2, 3; Homesteads.

DEFINITIONS.

"Assault." (State v. Baker, 863.)

"Cashier's check." (Clark v. Chicago etc. Co., 294.)

"County." (Prichard v. Board of Commissioners, 679.)

"Day." (State v. Michel, 364.)

"Delusion." (Hemingway's Estate, 815.)

"Due process of law." (Carr v. Brown, 855.)

"Person." (Johnson v. Goodyear Min. Co., 17.)

"Public welfare." (State v. Hay, 691.)

"Reliction." (Hammond v. Shepard, 235.)

DELUSION.

See Insane Persons.

DEMURRER.

See Pleading, 2-4.

DESCENT.

SURVIVORSHIP—CONSTRUCTION OF WILL.—If three sisters execute wills by which each devises all of her real and personal estate to her two sisters or the survivor, and after her death certain legacies to certain named legatees, and subsequently all three of the testatrices lose their lives in the same disaster, with no fact or circumstance appearing from which it can be inferred that either survived the others, the question of survivorship is uncertainable, and the rights of succession to their estates are to be determined as if death occurred to all at the same moment. In such case the wills must stand as if they contained only the bequests to the legatees named and then surviving, and the residue of the estate, real and personal, of each testatrix, if any, passes as intestate estate to her next of kin and heirs at law. (Willbor, Petitioner, 842.)

See Wills, 5.

DEVISE.

See Wills.

DIVORCE.

See Marriage and Divorce.

DOGS.

See Animals.

DORMANT JUDGMENT.

See Execution, 3, 4.

DOWER.

1. DOWER — PURCHASE MONEY MORTGAGE — WIFE'S FAILURE TO JOIN IN—EFFECT OF.—Under the statute of Illinois a wife who fails to join in a purchase money mortgage is not entitled to dower as against the mortgagee or those claiming under him, but is entitled to dower as against all other persons. (Frederick v. Emig, 283.)

2. DOWER — RELEASE OR BAR — JOINDER IN DEED FRAUDULENT AS TO CREDITORS.—A wife's joinder in her husband's deed for the purpose of releasing her dower, which deed is set aside during his lifetime as a fraud upon his creditors, does not

release or bar her right to dower, but she may assert it after his death, if not otherwise barred. (Frederick v. Emig, 283.)

3. **DOWER—RELEASE OR BAR—CLAIM OF FEE, UNDER FRAUDULENT DEEDS.**—A wife's claim to the fee of land transferred by her husband to her through his brother, in fraud of the husband's creditors, which deed was set aside for that reason during the husband's lifetime, does not affect her right to dower, which was at the time of such transfer a mere expectancy. (Frederick v. Emig, 283.)

4. **DOWER—REDEMPTION—RES JUDICATA.**—If land has been sold for the benefit of creditors, and a controversy arises between the purchaser and the owner's wife, who claims the fee as assignee of a certificate of purchase on foreclosure, the purchaser's contention, if it prevails, that the wife's transaction was merely a redemption, is, as against him, *res judicata* in a subsequent proceeding by her for dower in the property. (Frederick v. Emig, 283.)

5. **DOWER—WHEN RIGHT TO, DOES NOT EXTEND TO ENTIRE PREMISES.**—If a husband's land, sold under a purchase money mortgage, in which his wife did not join, is redeemed by her, but is afterward sold for the benefit of his creditors, she cannot have dower in that part of the land representing the amount of the encumbrance, especially where she has been reimbursed from a part of the proceeds of the latter sale. She must contribute ratably to the amount of the encumbrance, which was superior to her dower, or have dower only in the remainder. (Frederick v. Emig, 283.)

See Marriage and Divorce, 18-23.

DROVER'S PASS.

See Railroads, 8.

DUE PROCESS OF LAW.

See Constitution; Game Laws, 2.

EJECTMENT.

EJECTMENT—RECOVERY—TITLE.—A plaintiff in ejectment must recover upon the strength of his own title, and not upon the weakness of his adversary's. (Hammond v. Shepard, 274.)

See Fraudulent Conveyance, 2.

ELECTIONS.

See Municipal Corporations, 2, 2.

ELECTRIC COMPANY.

ELECTRIC LIGHT COMPANIES—INSULATION OF WIRES—NEGLIGENCE.—It is the duty of an illuminating company, using electric light wires charged with a high-tension current, to see that its wires, when strung where persons are liable to come in contact with them, are properly placed with reference to the safety of such persons and are properly insulated. Hence, if it runs such a wire into a store, but leaves it defectively insulated at points less than one foot from the front of the building, and a boy is injured by coming in contact therewith while cleaning the roof over a projecting window, there is strong *prima facie* evidence of negligence on the part of the company, which should be submitted to the jury. (Brown v. Edison etc. Co., 442.)

ELEVATORS.

1. **ELEVATORS INTENDED AND USED FOR FREIGHT TRANSPORTATION** are in themselves warning that they are not intended for the use or safety of passengers. (Henson v. Beckwith, 847.)

2. **LANDLORD AND TENANT—ELEVATOR ACCIDENT.**—If the tenant of a building containing a freight elevator under his sole control invites a stranger to use it, he, and not the landlord, must give warning and look out for the safety of his guest, or respond in damages for his injury, if any are recoverable. (Henson v. Beckwith, 847.)

3. **LANDLORD AND TENANT—ELEVATOR ACCIDENT.**—If the lessee of a building containing a freight elevator, and fit for the purposes for which it is leased, covenants to keep the interior in repair, the lessor to have no control over the elevator nor the right to make alterations, the latter is not liable for an injury to a third person caused by or about such elevator while he is upon the leased premises under invitation of the lessee and not of the landlord. (Henson v. Beckwith, 847.)

EMINENT DOMAIN.

1. **EMINENT DOMAIN—DAMAGES—VALUE OF LAND.**—Where property is taken under the right of eminent domain, the damages must be measured by the injury to the fair market value of the land at the time of the taking. (Cochrane v. Commonwealth, 491.)

2. **EMINENT DOMAIN.—THE MARKET VALUE** of a piece of property is its value in view of all the purposes to which it is naturally adapted, whether actually used for those purposes or not. (Cochrane v. Commonwealth, 491.)

3. **EMINENT DOMAIN—DAMAGES—VALUE OF UNOCCUPIED LANDS FOR SPECIAL USE.**—Where, under the right of eminent domain, an injury is done to property which is not commonly bought and sold, the amount of such injury may be ascertained by allowing testimony to be given of the value of the land for the special purpose for which it is by nature adapted, though it is not then used therefor, such testimony to be given by persons qualified to testify thereto from knowledge derived from experience in their own business in which they have dealt with similar property; but such testimony is admitted only when without it it is impossible to prove the value of the property in question. (Cochrane v. Commonwealth, 491.)

EQUITY.

1. **EQUITY JURISDICTION.**—The office of equity is to supplement, not to supplant, the law, and when the remedy at law is adequate, equity will not interfere. (First Nat. Bank v. Randall, 867.)

2. **EQUITY JURISDICTION TO ENFORCE STATUTE.**—A court of chancery has jurisdiction to enforce by injunction or otherwise, against foreign or domestic corporations, or their agents, the forfeitures provided by a valid anti-trust statute. Such proceeding is due process of law without any previous judgment or conviction in a court of law. (State v. Schlitz Brewing Co., 941.)

See Mistake, 1.

ESTATES OF DECEDENTS.

See Executors and Administrators.

ESTOPPEL.

See Executors and Administrators, 7; Husband and Wife, 7; Interpleader; Mortgages, 4; Replevin, 4; Wills, 12.

EVICTIION.

See Landlord and Tenant, 7-9.

EVIDENCE.

1. EVIDENCE.—ADMISSIONS OF LIABILITY contained in an offer of settlement brought about by a demand therefor are not inadmissible on the ground that they were made with a view to a compromise, if there is nothing to show that any effort has ever been made to compromise. (*Teasley v. Bradley*, 113.)

2. EVIDENCE—CALCULATION OF ACCOUNT MADE BY THIRD PERSON.—In an action for an account and settlement, a paper embracing a calculation of such account made by a third person, and with the making of which the defendant had nothing to do, is not admissible in evidence against the latter. (*Teasley v. Bradley*, 113.)

3. EVIDENCE—OPINIONS.—Evidence that an examination of a tool, after an accident and after the tool was broken, shows that it was constructed out of defective material, is inadmissible. (*Kent v. Yazoo etc. R. R. Co.*, 534.)

4. TRIAL.—BURDEN OF PROOF is on plaintiff to establish by a preponderance of the evidence all material facts necessary to sustain and establish his case. (*Warfield v. Railroad*, 911.)

5. TRIAL.—BURDEN OF PROOF.—Where a particular fact, necessary to be proved, rests peculiarly within the knowledge of a party, upon him rests the burden of proof. (*Hinkle v. Southern Ry. Co.*, 685.)

See Appeal; Corporations, 6, 9; Factors; Fraud; Instructions; Insurance, 18; Physicians; Railroads, 1, 2; Wills, 9, 10; Witnesses.

EXECUTIONS.

1. EXECUTIONS—AMENDMENT AFTER RETURN.—An execution authenticated by the seal of the court, but lacking the signature of the clerk who issues it, may be amended after its return by order of court upon such clerk to sign it, to validate the proceedings and sale under it. (*Taylor v. Buck*, 346.)

2. EXECUTIONS.—DEATH OF PLAINTIFF after judgment suspends the right to issue execution until the judgment is revived by scire facias. (*Tucker v. Carr*, 893.)

3. JUDICIAL SALES—DORMANT JUDGMENT.—A sale of land made upon a special execution issued after the death of the judgment plaintiff, without a revivor of the judgment, is absolutely void. (*Seeley v. Johnson*, 314.)

4. JUDICIAL SALES—DORMANT JUDGMENT—ALIAS EXECUTION.—Failure to revive a judgment after execution has been levied on the property of the judgment debtor, an appraisal made, and the property advertised for sale in his lifetime does not render void a sale made under an alias execution issued after his death. Such sale is valid, and the alias execution performs the office of a writ of venditioni exponas at common law. (*Rain v. Young*, 325.)

5. JUDICIAL SALES—ADJOURNMENT OF.—If an officer strikes off real estate to the highest bidder at the time and place

daily advertised for its sale under execution, and, after the persons there assembled have dispersed and gone, the officer returns to the place of sale because of the purchaser's failure to comply with his bid and the conditions of sale, and, shortly before the expiration of the advertised hour of sale, publicly announces that the sale is adjourned for two weeks, such adjournment is not legal, and the sale held under such notice is void. To render such adjourned sale legal, notice thereof must be given in the presence and hearing of the persons assembled at the time and place first fixed for the sale. (Weatherby v. Slape, 627.)

See Fraudulent Conveyances, 9, 10; Injunctions, 1; Replevin, 7.

EXECUTORS AND ADMINISTRATORS.

1. EXECUTORS AND ADMINISTRATORS—ADMINISTRATION ON ESTATE OF LIVING PERSON.—NO COURT HAS, NOR CAN HAVE, JURISDICTION to grant letters of administration on the estate of a living person, though he may be supposed to be dead. Such grant of letters, as well as the administration, is absolutely null and void. (Carr v. Brown, 855.)

2. CONSTITUTIONAL LAW.—ADMINISTRATION UPON THE ESTATE OF A LIVING PERSON is a deprivation of property without due process of law. Hence, a statute authorizing the estate of a living person, because of his absence for a certain time without being heard from, to be administered upon as if he were dead is unconstitutional and void. (Carr v. Brown, 855.)

3. EXECUTORS AND ADMINISTRATORS.—PAYMENT BY A FOREIGN DEBTOR TO THE DOMICILIARY ADMINISTRATOR will be a bar to a suit brought by an ancillary administrator subsequently appointed. (Frothingham v. Shaw, 475.)

4. EXECUTORS AND ADMINISTRATORS — POWER TO BORROW MONEY AND MORTGAGE LAND.—Under a will giving an executor power, should it be necessary, to raise money in such way as seemed best to him for the payment of debts, the executor has power to borrow money and to secure the debt by a deed or mortgage. (Fletcher v. American Trust etc. Co., 164.)

5. EXECUTORS AND ADMINISTRATORS — BORROWING MONEY IN EXCESS OF DEBTS.—While an executor with authority to borrow money for the payment of debts has no power to borrow more than the amount of the debts, yet a lender has the right to presume that this power was properly exercised, and need not inquire into the amount of the debts, and if he loans more than the amount of the debts and the contract is free from fraud and collusion, the estate is bound. (Fletcher v. American Trust etc. Co., 164.)

6. EXECUTORS AND ADMINISTRATORS — BORROWING MONEY—ATTORNEYS' FEES.—An executor, having power under a will to raise money for the payment of debts in such manner as seems best to him, has authority to contract for the payment of attorneys' fees if the note given for the payment of money borrowed has to be collected by suit. (Fletcher v. American Trust etc. Co., 164.)

7. ESTOPPEL—ESTATES OF DECEDENTS.—One who has possession of the estate of a decedent without administration, and with the acquiescence of the heir at law upon an agreement with the latter to manage and invest the estate for him, is accountable directly to him, and cannot defeat a suit brought against him by

such heir by claiming that the right of action is in the administrator of the decedent. (Teasley v. Bradley, 113.)

See Creditor's Bill, 3; Taxes; Wills.

EXPERT EVIDENCE.

See Witnesses, 3-5.

FACTOR.

FACTORS—EVIDENCE OF NEGLIGENCE.—The question of negligence, in the disposal of goods received by a factor, held by him for a year and then consumed by fire, may be submitted to jury upon evidence of their market value at the time that they were received by him. (Usborne v. Stephenson, 778.)

See Limitation of Actions, 4-7.

FALSE IMPRISONMENT.

1. FALSE IMPRISONMENT—ACTION FOR—ARREST WITHOUT WARRANT.—If a person is arrested without a warrant, and is detained in prison for an unreasonable period of five days or more, without any writ or order of any court, he has a right of action for false imprisonment not only against the officers who arrested him, but against those who unlawfully held him in custody. (Leger v. Warren, 738.)

2. FALSE IMPRISONMENT—ACTION FOR—DEFENSE—ARREST WITHOUT WARRANT.—In an action for false imprisonment, based upon an arrest without warrant, and detention for an unreasonable period, without any writ or order of court, it is no defense for the arresting officers that they acted under orders from a superior officer. They become, under such circumstances, wrongdoers from the beginning, and are liable as such equally with those by whom the imprisonment was continued. (Leger v. Warren, 738.)

3. FALSE IMPRISONMENT—ARREST UNDER WARRANT.—An imprisonment resulting from an arrest under a valid warrant is not a false imprisonment. (Page v. Citizen's Banking Co., 144.)

4. PARTNERSHIP.—MALICIOUS ARREST and malicious prosecution are causes of action of a kindred nature. Hence, if a partnership is liable to be sued as such for a malicious prosecution, it will also be liable to be sued in the same manner under similar circumstances for a malicious arrest. (Page v. Citizens' Banking Co., 144.)

5. RAILROADS—LIABILITY FOR FALSE ARREST.—A railroad company is not liable for the false arrest of a passenger on one of its trains, where the conductor in charge of the train merely pointed out such passenger to a sheriff who had come to arrest him as a party suspected of a capital offense. (Owens v. Wilmington etc. R. R. Co., 642.)

FELLOW-SERVANTS.

See Master and Servant.

FENCES.

See Railroads, 8.

FORECLOSURE.

See Mortgages.

FOREIGN CORPORATION.

See Corporations, 19-26.

FORMER JEOPARDY.

See Pleading, 9.

FRAUD.

FRAUD—PROOF OF.—If fraud is alleged, great latitude of proof is allowed, and every fact or circumstance from which a legal inference of fraud may be drawn is admissible. Yet fraud cannot be presumed, but must be proved, clearly and distinctly, by the party alleging it. (Snayberger v. Fahl, 818.)

See Infants; Marriage and Divorce, 15, 16.

FRAUDULENT CONVEYANCE.

1. FRAUDULENT CONVEYANCES — PLEADING. — Allegations that a conveyance is without consideration and for the purpose of hindering and delaying creditors are not conclusive even on demurrer, because such conveyance is not void if the debtor has other property sufficient to satisfy his debts. The best and most conclusive evidence that the debtor has no other property is the return of an execution unsatisfied. (First Nat. Bank v. Randall, 867.)

2. FRAUDULENT CONVEYANCES — SETTING ASIDE. — After a creditor has secured a lien by attachment upon property of his debtor fraudulently conveyed, and has recovered a judgment against the grantor, upon which execution is to issue, a court of equity has independent and auxiliary jurisdiction to set aside the conveyance in order to clear away a cloud upon the title, so that the interest of the debtor may be sold to better advantage for both his and his creditor's benefit. (First Nat. Bank v. Randall, 867.)

3. FRAUDULENT CONVEYANCE—BILL TO SET ASIDE—PLEADING.—If a grantee in voluntary conveyance is a party to a bill to set it aside as fraudulent against creditors, it is not necessary to allege that he actually participated in, or was privy to, the grantor's fraudulent purpose. (First Nat. Bank v. Randall, 867.)

4. FRAUDULENT CONVEYANCES — ATTACK AT LAW.—If a transfer of property is fraudulent and void as to a creditor, the debtor retains his interest in the property, as to such creditor, notwithstanding the conveyance, and the latter may attack it in an action at law. (First Nat. Bank v. Randall, 867.)

5. FRAUDULENT CONVEYANCES—PREFERENCES.—If a creditor takes a judgment, or conveyance, or payment in any form, to secure an actual debt, the transaction is valid against other creditors, although the former knew that the effect would be to postpone the others, and the debtor intended it to have that effect. The criterion is not the effect but the fraudulent intent. (Snayberger v. Fahl, 818.)

6. FRAUDULENT CONVEYANCES—PREFERENCES.—To impeach the securing or payment of an actual debt there must be evidence tending to show, first, some other advantage or benefit to the debtor beyond the discharge of his obligation, or, secondly, some other benefit to the creditor beyond mere payment of his debt, or lastly, some injury to other creditors beyond mere postponement of the debt preferred. (Snayberger v. Fahl, 818.)

7. FRAUDULENT CONVEYANCES — PREFERENCES.—THE MOTIVE OF THE CREDITOR preferred and not of the debtor

determines the fraudulent character of a conveyance or transaction attacked on the ground that it was made with intent to defraud other creditors. (Snayberger v. Fahl, 818.)

8. FRAUDULENT CONVEYANCES—PREFERENCES—MORTGAGE.—If a mortgage defectively executed is given for a valid debt, the mortgagor may, just before a verdict is taken against him by another creditor, absolutely convey the mortgaged premises to the mortgagee, and if the amount of the mortgage is just about the same as the value of the property, and the only intent of the parties is to secure payment of the mortgage, the conveyance is not fraudulent as to other creditors. (Snayberger v. Fahl, 818.)

9. EXECUTIONS — SALES — FRAUDULENT CONVEYANCES — EJECTMENT.—After levy upon real property in possession of a debtor, he cannot, with a view to defeat the execution creditor, transfer the possession, even to the real owner, who must pursue his title by an action in ejectment against the purchaser at the sheriff's sale. (Feigenspan v. Driesigacker, 799.)

10. EXECUTIONS—SALES—FRAUDULENT CONVEYANCES.—A mortgagor cannot, by confession of judgment in ejectment, deliver possession of a lot claimed to be mortgaged to the mortgagee, so as to defeat the claim of an execution creditor of such mortgagor who has already levied an execution on such lot. (Feigenspan v. Driesigacker, 799.)

See Creditor's Bill, 1; Dower, 2.

GAME LAW.

1. GAME LAWS—CONSTRUCTION.—A statute making it "unlawful to sell, offer for sale, or have in possession for sale any species of trout at any time," applies with as much force to trout lawfully caught in another state, shipped into the state, and becoming a part of the general property thereof, as it does to those caught therein. (State v. Schuman, 754.)

2. GAME LAWS—PROHIBITION ON SALE OF GAME.—A state may prohibit the taking or sale of fish within its borders, and if fish are caught in another state, brought into, mingled with, and become a part of the mass of the property of the state where their sale is prohibited, the person who imports them and violates such law must suffer the penalty prescribed thereby. (State v. Schuman, 754.)

3. GAME LAWS—CONSTRUCTION—CONSTITUTIONAL LAW —DUE PROCESS OF LAW.—A statute making it "unlawful to sell, offer for sale, or have in possession for sale any species of trout at any time," applies to trout shipped into the state and offered for sale, and as to a person offering such fish for sale or selling them, the statute is not unconstitutional as depriving him of his property without due process of law. (State v. Schuman, 754.)

GAMING.

See Municipal Corporations, 8; Lottery; Police Power, 2.

GARNISHMENT.

See Attachment, 5-8.

GIFTS.

See Husband and Wife, 2, 3.

GRAIN OPTIONS.

See Police Power, 3; Statutes, 19.

GUARDIAN AND WARD.

1. **GUARDIAN AND WARD—INCOMPETENTS—JURISDICTION TO APPOINT GUARDIAN.**—In case of application for guardianship of an incompetent person, he must be served with proper notice of the time and place of the hearing, in order to give the court jurisdiction to make the appointment. An order and notice merely specifying the day of hearing without naming the hour or place is insufficient. (McGee v. Hayes, 57.)

2. **GUARDIAN AND WARD—INCOMPETENTS—NOTICE OF HEARING—WAIVER—PRESENCE OF INCOMPETENT.**—Proper notice of the time and place of hearing of an application for the appointment of a guardian for an incompetent person, necessary to give the court jurisdiction to act, is not waived by the presence of such incompetent at the hearing. (McGee v. Hayes, 57.)

3. **GUARDIAN AND WARD — INCOMPETENTS — COLLATERAL ATTACK UPON JURISDICTION.**—If proceedings for the appointment of a guardian for an incompetent person show upon their face that the court was without jurisdiction to make the order appointing such guardian, it is subject to collateral attack. (McGee v. Hayes, 57.)

HEALTH INSPECTOR.

See Officers, 12.

HIGHWAY.

1. **LAW OF ROAD.**—The driver of a team taking the left-hand side of the highway assumes the risk of consequences which may arise from his inability to get out of the way of another team approaching on the right side of the road, and is responsible for injury sustained by the latter while exercising ordinary care. (Angell v. Lewis, 881.)

2. **LAW OF ROAD.**—One who violates the law of the road by driving on the left side assumes the risk of such experiment, and is required to use greater care than if he had kept to the right, and if, under such circumstances, a collision takes place, the presumption is against the person on the left side of the road, especially if the accident occurs in the dark. (Angell v. Lewis, 881.)

3. **LAW OF THE ROAD.**—The driver of a team has the right to presume that the driver of a team coming in an opposite direction will observe the law of the road and keep to the right, as he himself is doing. (Angell v. Lewis, 881.)

4. **LAW OF ROAD.**—If the driver of a team observing the law of the road discovers a team approaching in an opposite direction in time to prevent a collision, by stopping or otherwise, it is his duty to do so, although the driver of the other team is guilty of negligence in violating the law of the road. (Angell v. Lewis, 881.)

5. **NEGLIGENCE—BICYCLES—LAW OF ROAD.**—The rights and duties of a person on a bicycle and a driver of a wagon on the highways in a city are reciprocal; each is required to obey the law of the road, and conform to its requirements by passing to the right. (Foote v. American Product Co., 806.)

6. **LAW OF ROAD.**—By the law and custom of the land, it is the duty of persons traveling in wagons or other vehicles meeting

each other on the public road to pass to the right. (Foote v. American Product Co., 806.)

7. **LAW OF ROAD—BICYCLES.**—The fact that a person is riding a bicycle does not deprive him of the protection of the law of the road, but requires the driver of a wagon to accord him the same privileges and rights in the highway as though he were using a carriage. (Foote v. American Product Co., 806.)

8. **NEGLIGENCE—LAW OF ROAD—BICYCLES.**—If a person riding a bicycle on the right-hand side of the street, at an ordinary rate of speed, and ringing his bell as he approaches a crossing, is there met by a wagon driven at a moderate rate of speed around the corner in such way as to show an intention to drive along the street on the same side as the bicyclist, and the latter, in attempting to prevent a collision and to dismount, is thrown under the wagon and injured, the question of the negligence of the parties is for the jury to determine under proper instructions, and binding instructions for the defendant is error. (Foote v. American Product Co., 806.)

9. **NEGLIGENCE—LAW OF ROAD—BICYCLES.**—If a bicyclist, observing the law of the road, acts on the assumption that the driver of a wagon will conform thereto, and, without any fault of the former, he is placed in a dangerous position by the negligence or carelessness of the driver of the wagon, he cannot be held to the same strict measure of care as under ordinary circumstances in attempting to relieve himself from the perilous situation. (Foote v. American Product Co., 806.)

10. **NEGLIGENCE—EVIDENCE—LAW OF ROAD—BICYCLES.** In an action by a bicyclist against the owner of a wagon to recover for personal injury suffered in a collision, while the bicyclist was conforming to the law of the road, and the driver of the wagon was not, a municipal ordinance requiring all vehicles, including bicycles, to keep to the right is admissible in evidence, not as proof of negligence, but to be considered with other evidence in ascertaining whether the defendant is guilty of negligence. (Foote v. American Product Co., 806.)

HOMESTEAD.

HOMESTEADS—CONVEYANCE OF.—A deed executed by the head of the family pending the continuance of the homestead estate and purporting to convey the reversionary interest in the property therein embraced is valid and effective. (Huntress v. Anderson, 105.)

See Judgment, 13.

HOMICIDE.

1. **HOMICIDE—RECKLESS USE OF FIREARMS.**—The mere fact that a person handles a gun in a careless and reckless manner and death results to another therefrom does not necessarily make the person handling the gun guilty of murder. To constitute the killing murder it must appear that there was an intention on the part of the slayer to discharge the gun, and that the circumstances were such that an act of that character naturally tended to destroy human life. (Austin v. State, 134.)

2. **HOMICIDE—RECKLESS USE OF FIREARMS.**—If a person recklessly discharges a gun at another, and death results therefrom, or if he recklessly discharges a gun into a crowd, although at no particular person, and death results to some one, such killing is murder. (Austin v. State, 134.)

8. HOMICIDE—RECKLESS USE OF FIREARMS.—If death results to one from the discharge of a gun in the hands of another, without an intention to kill or to discharge the gun, the person in whose hands the gun was held is not guilty of murder, although the gun may have been handled in a careless and negligent, or even reckless, manner. In such case the slayer is guilty of involuntary manslaughter only, and the particular grade of that crime depends upon whether it was lawful for the slayer to be in possession of a deadly weapon at the time and place of the killing. (*Austin v. State*, 134.)

HUSBAND AND WIFE.

1. HUSBAND AND WIFE—NECESSARIES—LOAN TO WIFE. A husband is not liable for money loaned to his wife with which to buy necessities. (*Marshall v. Perkins*, 841.)

2. HUSBAND AND WIFE—GIFT BY DEPOSIT IN BANK.—A deposit of money, the separate property of a wife, in a bank, and the taking of a pass-book showing an account in her name and that of her husband, "payable to the order of either of them," does not of itself show any gift to him, nor any joint interest in the deposit with right of survivorship; and the burden of proof is upon the husband's donee of such deposit to show that it did not continue to be the separate property of the wife. (*Denigan v. San Francisco Sav. Union*, 35.)

3. HUSBAND AND WIFE—DEPOSIT IN BANK.—JOINT INTEREST in money, the separate property of the wife, with right of survivorship therein, cannot be established by showing a deposit of such money in bank, and the taking of a pass-book in the names of the husband and wife, "payable to either of them," without any express declaration between the parties that the money should be held by them in joint tenancy. (*Denigan v. San Francisco Sav. Union*, 35.)

4. HUSBAND AND WIFE—HER RIGHT OF ACTION FOR ALIENATION OF HIS AFFECTIONS.—Under statutes which recognize the separate property rights of a wife and permit her to sue without joining her husband, she has a right of action against a third party for alienating her husband's affections. (*Betser v. Betser*, 303.)

5. HUSBAND AND WIFE—PARTIES.—The statutory right of action of a wife for a wrong done to her is her separate property, and her husband cannot control or interfere with the conduct of the suit or appeal from the decision therein. (*Walker v. Philadelphia*, 801.)

6. NEGLIGENCE—EVIDENCE—VALUE OF SERVICES AS NURSE.—In an action by a husband to recover for the loss of his wife's services resulting from a personal injury to her, evidence of his daughter as to what she was earning in her employment given up by her in order to nurse her mother after such injury is inadmissible. The liability of the defendant in such case is the ordinary wages of such attendance. (*Walker v. Philadelphia*, 801.)

7. HUSBAND AND WIFE—SEPARATE ACTIONS FOR NEGLIGENCE—ESTOPPEL—STATUTE OF LIMITATIONS.—If a wife maintains her statutory action and recovers judgment for personal injury, and a settlement is effected by which the defendant withdraws its motion for a new trial, and as part of the consideration for prompt payment without further contest, the husband's right of action for the loss of his wife's services resulting from such injury is barred by the issue of a writ and its discontinuance and the set-

tiement of the action of record, the husband is thereby estopped from maintaining an action, even by leave of court, especially after his right is barred by limitation. In such case the action of the court in striking off such discontinuance and permitting him to sue is improvident and erroneous. (Walker v. Philadelphia, 801.)

See Dower; Judgment, 10.

HYPOTHETICAL QUESTION.

See Witness, 5.

IMPRISONMENT FOR DEBT.

See Bastardy.

IMPROVEMENTS.

See Vendor and Purchaser.

INDEPENDENT CONTRACTOR.

See Master and Servant, 6.

INDICTMENT.

See Contempt, 4; Pleading, 10.

INFANTS.

1. INFANTS—TORT LIABILITY—FRAUD INDUCING CONTRACT.—An infant cannot be held liable for fraud or conversion, where to maintain the action the plaintiff must show that there was a contract, which was part and parcel of the fraudulent transaction. (Slayton v. Barry, 510.)

2. INFANCY—CONTRACT OF MINORS.—A minor may bind himself by contract for necessities, if reasonable, or by a contract beneficial to him. (Fardey v. American Ship Windlass Co., 844.)

3. INFANCY.—CONTRACT OF APPRENTICESHIP entered into by a minor, with the consent of his father, containing reasonable provision for his compensation and instruction in a useful art, and that a certain sum per week shall be retained from his wages and paid to him at the end of the term, or forfeited if he shall leave the employment before the end of the term, or be discharged before that time for cause, is beneficial to the infant, and in all respects binding on him, and if, after reaching majority, he voluntarily leaves the employment before the end of his apprenticeship, the wages retained under the contract are forfeited by him. (Fardey v. American Ship Windlass Co., 844.)

4. ACTION BY MINOR—WHO MAY MAINTAIN.—If the father of a minor child has disappeared and abandoned the matrimonial domicile, the mother may appear in court in behalf of such minor and assert the rights of the latter. (Williams v. Pope Mfg. Co., 890.)

INHERITANCE TAX.

See Taxes.

INJUNCTION.

1. INJUNCTION—EXECUTION IN REPLEVIN.—Injunction is the proper remedy to restrain the enforcement of an alternative

money judgment in an action for the recovery of personalty after tender of the property. (Marks v. Willis, 752.)

2. INJUNCTION—STOCKHOLDER'S RIGHT TO INSPECT BOOKS AND RECORDS.—The proper remedy to enforce the statutory right of a stockholder in a corporation to inspect the books and records thereof is by injunction. (Cincinnati etc. Co. v. Hoffmeister, 707.)

See Equity, 2; Officers, 1, 2; Replevin, 7; Waters, 2.

INSANE PERSONS.

1. INSANITY.—DELUSION IS A BELIEF that something exists which does not exist, and which no rational person, in the absence of evidence, would believe to exist. (Hemingway's Estate, 815.)

2. INSANE DELUSION MAY EXIST, although the belief entertained is not a physical impossibility. If, however, such belief is entertained against all evidence and probability, and after argument to the contrary, it affords ground for the inference that the person entertaining it labors under an insane delusion. (Medill v. Snyder, 807.)

See Guardian and Ward, 1-3; Wills, 7, 8.

INSOLVENCY.

See Bankruptcy; Banks, 4-6; Corporations, 13, 14; Creditor's Bill; Fraudulent Conveyances, 5-8.

INSTRUCTIONS.

1. TRIAL—INSTRUCTIONS.—If, in an action for an account and settlement, the defendant pleads payment, and introduces evidence in support of such defense, the failure of the court to instruct the jury thereon is error. (Teasley v. Bradley, 113.)

2. TRIAL—INSTRUCTIONS AS TO EFFECT OF WRITTEN INSTRUMENT.—If a written instrument sufficient in form and execution is in evidence, it is the duty of the court to instruct the jury as to its legal effect. (Capital Lumbering Co. v. Learned, 792.)

3. TRIAL—INSTRUCTIONS.—If binding instructions are given to the jury, or where the court refuses to take off a compulsory nonsuit, the reason for such action should be at least briefly stated, as an aid to counsel as well as to the appellate court. (Foote v. American Product Co., 806.)

See Agency; Appeal; Mobs, 3.

INSURANCE.

1. INSURANCE—BENEFIT SOCIETIES—VESTED RIGHTS. The right of a legally designated beneficiary to insurance under a certificate of membership in a benefit society becomes vested upon the death of the member, and no subsequent action of the society can change, nor affect, such rights. (Independent Foresters v. Keliher, 785.)

2. INSURANCE—BENEFIT SOCIETIES—VESTED RIGHTS. Under a benefit certificate issued by a benevolent association the beneficiary therein usually has no vested interest until the death of the member, and until then the latter can change the beneficiary without his consent by complying with the by-laws and rules of the organization. (Independent Foresters v. Keliher, 785.)

3. INSURANCE—BENEFIT SOCIETIES—CHANGE OF BENEFICIARY.—A member of a benevolent insurance association cannot change the beneficiary named in his certificate of membership except in the manner pointed out in the by-laws and rules of the association, and any material deviation therefrom invalidates the change or transfer. (*Independent Foresters v. Keliher*, 785.)

4. INSURANCE—BENEFIT SOCIETIES—CHANGE OF BENEFICIARY.—If the by-laws of a benevolent insurance association require a member who wishes to change his beneficiary to file a written petition with his local branch of the association, stating certain facts, and directing the local secretary to send the petition and the certificate of membership to the grand secretary, who shall issue a new one, the failure of the member to file such petition or surrender his old certificate is an omission of material acts, and an alteration by the local secretary of the name of the beneficiary in the original certificate is ineffectual to change the beneficiary. (*Independent Foresters v. Keliher*, 785.)

5. INSURANCE—BENEFIT SOCIETIES—CHANGE OF BENEFICIARY—WAIVER OF BY-LAWS.—The failure of the grand lodge of a benevolent insurance order to supply subordinate lodges with proper blank forms of petition for, or application for, change of beneficiaries, or the failure of a subordinate lodge to meet on a regular day when a petition for change of a beneficiary might have been considered, is not a waiver of the by-laws of the organization as to change of beneficiaries, nor is it any excuse on the part of the insured member for failing to substantially comply with such by-laws. (*Independent Foresters v. Keliher*, 785.)

6. INSURANCE, LIFE — BENEFICIARY — OWNERSHIP OF POLICY—POWER TO TRANSFER.—A life insurance policy, and the money to become due upon it, belong, the moment it is issued, without delivery, to the person named therein as beneficiary; and there is no power in the person procuring the insurance, by any act of his, by deed or will, to transfer to any other person the interest of the beneficiary without the latter's consent. The beneficiary designated in the policy is the proper person to receipt and sue for the insurance money. (*Jackson Bank v. Williams*, 530.)

7. INSURANCE—LIFE—BANKRUPTCY.—A policy of insurance on the life of a bankrupt, payable to his legal representatives, and having no cash surrender value and no value for any purpose except the contingency of its becoming valuable at the death of the bankrupt if the premiums are kept paid, does not vest in the trustee in bankruptcy as assets of the bankrupt's estate. (*Morris v. Dodd*, 129.)

8. VENDOR AND PURCHASER—LOSS BY FIRE.—When a binding agreement is entered into to sell land, and the improvements thereon were destroyed by fire before the vendor was in a condition to convey and before the vendee had gone into possession, the loss falls upon the vendor and not on the purchaser. (*Phinixy v. Guernsey*, 207.)

9. INSURANCE MONEY—WHO ENTITLED TO—VENDOR AND PURCHASER.—Where, as between a vendor and vendee of real estate, the improvements on which are destroyed by fire, the loss falls upon the vendor, he is entitled to collect and hold the money due on insurance policies issued on the property. (*Phinixy v. Guernsey*, 207.)

10. INSURANCE, FIRE—MISSTATEMENT AS TO OWNERSHIP.—If the owner of an undivided one-half interest in a building states in his written application for fire insurance that he is the sole and unconditional owner of the building, the issuance is

void, although such applicant is sincere in making such misstatement, as his co-owner had verbally promised to convey to him upon the payment of a certain sum. (Liverpool etc. Ins. Co. v. Cochran, 524.)

11. **INSURANCE — PROOFS OF LOSS — FORFEITURE OF POLICY.**—Under an insurance policy which provides that proofs of loss shall be furnished within sixty days, but the furnishing of the proofs within such time is not made a condition precedent to recovery, the failure so to do will operate simply to postpone the right of the insured to bring a suit until after he has furnished the proofs of loss required by the policy. (Southern Fire Ins. Co. v. Knight, 216.)

12. **INSURANCE—PROOFS OF LOSS—TIME OF FURNISHING.**—Where an insurance policy stipulates that the loss shall not become payable until sixty days after the proofs of loss have been furnished, and requires also that any suit on the policy must be commenced within twelve months after the fire, the insured must submit his proofs of loss in time for sixty days to elapse between the time when they were furnished and the expiration of the twelve months' limitation. (Southern Fire Ins. Co. v. Knight, 216.)

13. **INSURANCE — IRON-SAFE CLAUSE. — INVOICES OF GOODS PURCHASED,** covering every article embraced within a stock of merchandise on a given day, is not an inventory of such stock with the meaning of an "iron-safe clause," which requires the insured to take a complete itemized inventory of stock on hand at least once in each calendar year. (Southern Fire Ins. Co. v. Knight, 216.)

14. **INSURANCE—DIFFERENT CLASSES OF PROPERTY—ENTIRE CONTRACT—FORFEITURE.**—Where an insurance policy is issued in consideration of a gross premium, and provides that the policy shall be void in the event of a breach of a certain condition named therein, and this condition is broken, no recovery can be had on the policy, though separate classes of property are insured, and the stipulation violated relates solely to a matter connected with but one of these classes. (Southern Fire Ins. Co. v. Knight, 216.)

15. **INSURANCE—FIRE—PROOF OF LOSS.**—If a policy of insurance stipulates that if fire occurs the insured shall give immediate notice of any loss thereby in writing to the company, and, in sixty days after the fire, shall render a sworn statement stating the knowledge and belief of the insured as to the time and origin of the fire, and that, in the absence of compliance with such stipulations, no action can be maintained against the insurer, the submission of proofs of loss to the insurer within the time prescribed is a condition precedent to the payment of the loss or the maintenance of an action. (Cannon v. Phoenix Ins. Co., 124.)

16. **INSURANCE—FRIENDLY FIRES.**—If fire is employed as an agent, either for the ordinary purposes of heating the insured building, for the purposes of manufacture, or as an instrument of art, the insurer is not liable for the consequences thereof, so long as the fire itself is confined within the limits of the agencies employed, as from the effects of smoke or heat evolved thereby, or escaping therefrom from any cause, whether intentional or accidental. (Cannon v. Phoenix Ins. Co., 124.)

17. **INSURANCE—FIRE—SMOKE AND WATER—FRIENDLY FIRES.**—Under a policy of insurance against all direct loss or damage by fire, the insurer is not liable for damage arising from smoke and soot escaping from a defective stovepipe and resulting from a

fire intentionally built in a stove and kept confined therein, nor for damage caused by water used in cooling a portion of the building heated by such stovepipe, when the use of such water is not necessary to prevent ignition. (Cannon v. Phoenix Ins. Co., 124.)

18. **INSURANCE—FIRE—EVIDENCE—PROOF OF LOSS.**—In an action on a fire insurance policy, parol evidence is not admissible on the part of plaintiff to prove a fact in support of his claim of loss, when no proof thereof has been made and presented to the insurer prior to the institution of the suit, and it does not appear from the record that such fact was not discovered by plaintiff before suit was brought. (Cannon v. Phoenix Ins. Co., 124.)

19. **CONSTITUTIONAL LAW—PROHIBITING FOREIGN INSURANCE.**—THE LEGISLATURE has power to prohibit foreign insurance companies, their agents or brokers, from soliciting business within a state, even though the insurance contract makes the solicitors the agents of the insured in the transaction. (Commonwealth v. Nutting, 483.)

See Agency.

INTEREST.

1. **MUNICIPAL CORPORATIONS — INTEREST ON WARRANTS.**—Warrants for the payment of money against a municipal corporation presented to the city treasurer and indorsed by him "not paid for want of funds," as authorized by ordinance, are thereafter interest bearing from that date. (Monteith v. Parker, 768.)

2. **MUNICIPAL CORPORATIONS ARE LIABLE FOR INTEREST** on their debts the same as individuals. (Monteith v. Parker, 768.)

3. **MUNICIPAL CORPORATIONS — INTEREST ON WARRANTS.**—If an interest bearing warrant against a city is surrendered and others to an equal amount are issued in lieu thereof, and dated and indorsed as the original, the later issue cannot be regarded as a payment, but merely as an exchange, and they too bear interest the same as the original. (Monteith v. Parker, 768.)

4. **CARRIERS — NEGLIGENT DELAY — DAMAGES—INTEREST.**—A judgment for damages against a carrier for negligent delay in the shipment of goods does not bear interest as matter of law. (Railroad v. Cabinet Co., 933.)

See Usury.

INTERPLEADER.

JURISDICTION OVER NONRESIDENT—INTERPLEADER—ESTOPPEL.—Where a nonresident is made a defendant by a proceeding in the nature of an interpleader, and a judgment is rendered against him upon a personal service of process in the state where he resides, such judgment is void, and a recital therein that service had been duly made and that he should be forever barred of any claims in respect to the subject matter of the suit works no estoppel. (Hinton v. Penn Mutual Life Ins. Co., 636.)

INTERSTATE COMMERCE.

1. **INTERSTATE COMMERCE—AGENCY.**—If a person, after obtaining orders for goods from resident customers, submits such orders in his own name to a nonresident manufacturer, and obtains the goods which are charged to him individually, shipped to him directly in a single package, which is broken by him, and the

goods delivered to the several customers and the price collected by him, the transaction is not one of interstate commerce exempt from a state license or privilege tax, and he sells the goods as owner, and not as an agent. (Croy v. Obion County, 931.)

2. CONSTITUTIONAL LAW — INTERSTATE COMMERCE — INTERFERENCE WITH SEAMEN.—A statute making it a crime to persuade or attempt to persuade any seaman to leave any vessel within the jurisdiction of the state, is a valid exercise of the police power, and not unconstitutional as a regulation of or interference with interstate or foreign commerce. (Ex parte Young, 772.)

3. CONSTITUTIONAL LAW—INTERSTATE COMMERCE.—It is only when a statute of a state conflicts with an act of Congress regulating foreign or interstate commerce, or contravenes the general policy of the government, that it must yield. (Ex parte Young, 772.)

4. CONSTITUTIONAL LAW—REGULATION OF COMMERCE. A state has power to enact a statute regulating commerce within its borders if the subject covered is one over which Congress has not assumed control. (Ex parte Young, 772.)

JOINT LIABILITY.

1. TO MAKE PERSONS JOINT TORT FEASORS they must actively participate in the act which causes the injury. (Brown v. Louisburg, 677.)

2. RELEASE—EFFECT OF, ON PARTY SECONDARILY LIABLE FOR TORT.—A full release and discharge, for a valuable consideration, of a party primarily liable for a tort injury operates as a release of the party secondarily liable, especially where the latter is entitled to recover from the former whatever damages he might be compelled to pay to the injured party. (Brown v. Louisburg, 677.)

See Torts.

JUDGMENT.

1. JUDGMENT—ASSIGNMENT.—Without an assignment of the undertaking on appeal the assignee of a judgment cannot maintain an action against the sureties on the appeal bond, no matter whether the assignment was made pending the appeal or after the judgment has become a finality. (Chilstrom v. Eppinger, 46.)

2. JUDGMENTS — ASSIGNMENT. — THE CONTRACT OF SURETIES upon an appeal bond is entirely distinct from, and independent of, the judgment, and not a necessary incident to it, and the rights under it do not pass by assignment of the judgment. (Chilstrom v. Eppinger, 46.)

3. JUDGMENTS AGAINST DEAD PERSONS—COLLATERAL ATTACK.—A judgment against a deceased defendant theretofore duly served with process is void, and both such judgment and a sale under execution in satisfaction thereof may be collaterally attacked. (Keger v. Vickery, 318.)

4. JUDGMENTS — SISTER STATE — CONCLUSIVENESS OF PRESENT DEBT.—A judgment recovered in another state is not conclusive of the existence of a present debt, because of the defenses which may be urged against it. (First Nat. Bank v. Randall, 867.)

5. JUDGMENTS.—COURTS HAVE INHERENT POWER TO AMEND OR SET ASIDE their judgments for cause. (State v. Watson, 871.)

6. JUDGMENTS—RES JUDICATA—DEFENSE AVAILABLE ON FIRST TRIAL.—After final judgment in attachment, a release alleged to have been given after the attachment and before the return day of the writ is not available as a defense in an action on the bond given to release the property from attachment. Such defense was within the knowledge of the defendant, and should have been pleaded in the suit on the attachment, and he is concluded by the judgment therein. (Tucker v. Carr, 893.)

7. JUDGMENTS—RES JUDICATA AVAILABLE.—A judgment is conclusive against all defenses which might have been set up before it was rendered, and this is true for the purposes of every subsequent suit between the same parties and their privies, whether founded upon the same or a different cause of action. (Tucker v. Carr, 893.)

8. JUDGMENTS—RES JUDICATA—PARTIES.—A judgment recovered against a municipal corporation for injury caused by a defect or obstruction in the highway is conclusive evidence of its necessary facts and conditions, in a subsequent action by the municipality against a third person, the author of the defect or nuisance, who is liable over and who was notified of the first suit. (Pawtucket v. Bray, 837.)

9. JUDGMENTS—RES JUDICATA—PARTIES.—No party is, as a general rule, bound in a subsequent suit by a judgment, unless the adverse party, now seeking to secure the benefit of the former adjudication, would have been prejudiced by it if it had been determined the other way. In order to come within the rule as to res judicata, the first judgment must have been binding on both parties to the second action. (Walker v. Philadelphia, 801.)

10. JUDGMENTS—RES JUDICATA—HUSBAND AND WIFE.—If a wife, in an action to which her husband is merely a formal party, recovers judgment for personal injury to herself, and her husband brings another action to recover for the loss of the wife's services resulting from the same injury, the record of the first suit is not admissible in evidence, as conclusive of the defendant's negligence. Such record is res inter alios acta, and instead of being conclusive of such negligence, is wholly inadmissible. (Walker v. Philadelphia, 801.)

11. RES JUDICATA—RECOVERY OF MONEY PAID ON JUDGMENT.—A bank, which pays its money to satisfy a judgment obtained against it by mistake as trustee of the principal defendant in a court of competent jurisdiction, in a suit in which the bank was duly served with process, and appeared and voluntarily took such action as made the judgment a necessary result of the proceedings, cannot recover such money, so long as the judgment remains unreversed. (People's Savings Bank v. Heath, 481.)

12. RES JUDICATA—SUBMISSION ON AGREED FACTS.—The fact that a case is submitted on agreed facts, so that all objections to the form of action are waived cannot authorize a court to disregard the effect of a former unreversed judgment. (People's Savings Bank v. Heath, 481.)

13. JUDGMENTS—RES JUDICATA—APPEALABLE ORDERS. An order denying the right of an insolvent debtor to the proceeds of a crop grown upon land claimed by him as a homestead, and establishing the right of the assignee in insolvency thereto, is appealable, and, after the time for an appeal therefrom has elapsed, becomes res judicata and a bar to an action by the homestead claimant to recover the value of the crop against such assignee in his individual capacity. (Sunkler v. McKenzie, 86.)

14. JUDGMENTS—RES JUDICATA.—The determination of a substantial matter of right upon motion or summary proceeding upon which the parties interested have a right to be heard and necessarily decided by the court as the basis for the order finally entered, is res judicata whenever the same subject matter is sought to be litigated in an independent action between the same parties. (Sunkler v. McKenzie, 88.)

See Executions, 3, 4; Justice of Peace, 1-3; Replevin, 6.

JUDICIAL SALE.

See Auction, 3; Executions, 3-5.

JURISDICTION.

1. JURISDICTION, EXTRATERRITORIAL, OF STATES OF THE UNION.—Each state in the Union is a coequal with the others in point of authority and power, and one state, through its courts, cannot extend its coercive power, nor provide for personal service of process, nor affect by judicial determination property outside of its own territory; any such attempt is a usurpation of authority and void. (Hinton v. Penn Mutual Life Ins. Co., 636.)

2. JURISDICTION—SERVICE OF SUMMONS—JUDGMENT. The fact of service of summons, rather than proof of its service, gives the court jurisdiction of the person of the defendant, and, if he is in fact served with summons, a return showing upon its face that it was made by one having authority, even though not in fact so made, confers upon the court jurisdiction to hear and determine the case, and, until set aside by some valid proceeding, a judgment by default based thereon is valid. (Bank of Orland v. Dodson, 42.)

3. JURISDICTION—WAIVER OF RIGHT TO ASSAIL.—If defendant is in fact served with summons, and does not appear nor in any way call in question the regularity of the service, takes no steps to have the judgment set aside, and permits his property to be sold without objection, pursuant to the judgment entered in the action, and pays a deficiency judgment, he cannot, after the time for appeal has expired, attack such judgment by questioning the regularity of the service of the summons. (Bank of Orland v. Dodson, 42.)

4. JURISDICTION—LOSS OF:—After a court has entered its judgment upon a service of summons, appearing from the record to have been regular, it has no jurisdiction to again try the case until that judgment is set aside; and after the time for an appeal therefrom has elapsed and the judgment has been satisfied, its judgment at the second trial of the case under an alias summons is void. (Bank of Orland v. Dodson, 42.)

See Appeal, 10, 11; Equity, 1, 2.

JURY.

See Trial.

JUSTICE OF PEACE.

1. JUSTICE'S COURT—JURISDICTION—VOID JUDGMENT. A justice's court is without jurisdiction of an action upon a note stipulating for attorneys' fees in event of suit when the amount of the principal and attorneys' fees demanded exceed the statutory

jurisdictional amount, and the judgment rendered in such action is void. (*De Jarnatt v. Marquez*, 90.)

2. JUDGMENTS—JUSTICE OF PEACE.—A justice's judgment for a definite sum and costs is valid, and, though the words "subject to all credits, if any," are added thereto, they may be rejected as surplusage. (*Torilla v. Alexander*, 928.)

3. JUDGMENTS.—JUSTICE OF PEACE has the same right and power to correct his judgments as courts of record have. (*Torilla v. Alexander*, 928.)

See Appeal, 10, 11.

LANDLORD AND TENANT.

1. LANDLORD AND TENANT—LEASE, WHEN COMPLETE.—A verbal contract of lease, complete in itself independent of any writing, and unaccompanied by an intention to have it reduced to writing as perfecting it, is an enforceable contract. If such verbal contract is made and subsequently the parties agree that it shall be reduced to writing and signed, but this is never done, it is still enforceable as a binding contract. (*Laroussini v. Werlein*, 350.)

2. LANDLORD AND TENANT—VERBAL LEASE WHEN INCOMPLETE.—If a verbal contract of lease is agreed upon with the understanding and intention that it shall be reduced to writing and signed, and that the written lease shall take the place of the verbal agreement, then, until the written lease is drawn and signed, the contract is incomplete, and either party before signing may retract, decline to go further and refuse to consummate the agreement. (*Laroussini v. Werlein*, 350.)

3. LANDLORD AND TENANT—ASSIGNMENT OF RIGHT TO RENEW LEASE.—The right of a tenant to renew a lease is assignable, and the benefit of such right may be enforced by the assignee. (*McClintock v. Joyner*, 541.)

4. LANDLORD AND TENANT—RIGHT TO RENEW LEASE—WHEN MAY BE EXERCISED.—The right of the tenant to renew the lease not limited by grant may be exercised at any time during the original term, unless the tenant is called upon by the landlord to exercise or decline his privilege of renewal at an earlier period. (*McClintock v. Joyner*, 541.)

5. LANDLORD AND TENANT—LIABILITY TO STRANGER.—A landlord out of possession is liable to a stranger for the defective conditions of premises under lease, when they are a nuisance when leased, or in the nature of things must become so by their use, or when the premises are let to be used for purposes for which they are not fit or safe, and this was known, or ought to have been known to the landlord at the time of making the lease. (*Henson v. Beckwith*, 847.)

6. LANDLORD AND TENANT—LIABILITY TO THIRD PERSON.—If premises at the time when leased are not a nuisance nor unfit for the purposes for which they are leased, and injury happens to some guest of the tenant, through some act of the latter, or while he has sole possession of the premises, the landlord is not liable therefor. (*Henson v. Beckwith*, 847.)

7. LANDLORD AND TENANT—EVICTION FROM PART OF PREMISES—APPORTIONMENT OF RENT.—If a tenant is evicted from part of the leased premises through a sale under a deed of trust of which he had knowledge when taking the lease, he is not entitled to occupy the remaining part of the premises rent free, but is liable for a due proportion of the rent for that part. (*Cheairs v. Coats*, 546.)

8. LANDLORD AND TENANT—EVICTIOIN FROM PART OF PREMISES—APPORTIONMENT OF RENT.—If a lessee is evicted from part of the premises by a paramount title, and continues in possession of the other part, his rent must be apportioned, and he must pay a reasonable proportion of the rent for the land held by him, and cannot hold it rent free. (Cheairs v. Coats, 546.)

9. LANDLORD AND TENANT — EVICTIOIN FROM PART OF PREMISES—UNLAWFUL DETAINER—EVIDENCE.—In an action by a landlord in unlawful detainer, against his tenant, evicted from part of the premises, but occupying the remainder and refusing to pay any rent therefor, evidence is admissible to show that such eviction was by paramount title of which the tenant had notice when taking the lease. Evidence is also admissible to show a pro rata distribution of the rent for that part of the premises which the tenant continues to occupy. (Cheairs v. Coats, 546.)

See Elevators, 1-3.

LARCENY.

1. LARCENY BY BAILEE.—The crime of larceny after a trust can be shown only by proof that the bailee has made a fraudulent conversion to his own use of the thing intrusted to him. If there is no proof of positive fraud or intentional wrong on the part of the accused, there can be no conviction. (Almand v. State, 140.)

2. LARCENY BY PLEDGOR.—A pledgee has a special property in the thing pledged, and a pledgor who takes the property from the possession of the pledgee with the fraudulent intent and felonious design of depriving the latter of such possession and of his security may be convicted of larceny. (Henry v. State, 137.)

See Burglary, 1; Officer, 3.

LAW OF THE ROAD.

See Highways.

LEASE.

See Landlord and Tenant.

LEGACY.

See Wills.

LETTERS.

See Libel, 1.

LIBEL.

1. LIBEL—WHERE AND WHEN PUBLISHED—LETTER SENT BY MAIL.—A libel contained in a letter written and mailed in one state to an addressee in another state is not published until such letter is received and read. (McCarlie v. Atkinson, 540.)

2. LIBEL, CONCEALMENT OF CAUSE OF ACTION—STATUTE OF LIMITATIONS.—The sending of libelous matter by mail to another state where the letter is opened and read is not a fraudulent concealment of the contents of the letter or its publication, or of the cause of action for the libel so as to take the case out of the operation of the statute of limitations. (McCarlie v. Atkinson, 540.)

3. LIBEL—PRIVILEGED COMMUNICATIONS—COURT PROCEEDINGS.—A full and fair report of proceedings in open court upon a matter standing for final decision, even though the inquiry may be preliminary and ex parte, is privileged. This rule, however, gives no license to publish libelous matter simply because it is found in the files of a court. (*Metcalf v. Times Publishing Co.*, 900.)

4. LIBEL—PUBLICATION OF CHARGES FILED IN COURT. One person may make charges against another for adjudication and as to him they are privileged, but this does not confer upon others the right to publish and spread them before they come up for adjudication, and such publication may be libel. (*Metcalf v. Times Publishing Co.*, 900.)

5. LIBEL—PRIVILEGED COMMUNICATION—COURT PROCEEDING, WHAT IS.—An application made in chambers before a single judge upon a motion for an ex parte injunction before and until a hearing is a proceeding in court, a fair and full report of which may be published as privileged matter. (*Metcalf v. Times Publishing Co.*, 900.)

6. LIBEL—PUBLICATION OF PLEADINGS OR COURT PROCEEDINGS.—Whether judicial proceedings be in a court of record or not, finished or unfinished, ex parte or otherwise, no individual and no newspaper has the right to publish mere arbitrary selections from the proceedings or the pleadings in the case, consisting of those portions which impute crime or moral turpitude to, or cast ridicule or odium upon, the person to whom they refer. Such garbled report of the pleadings or the proceedings is not privileged, and its publication is a libel. (*Metcalf v. Times Publishing Co.*, 900.)

LIMITATION OF ACTIONS.

1. LIMITATIONS OF ACTIONS—ACKNOWLEDGMENT OF DEBT AND PROMISE TO PAY—WHEN SUFFICIENT.—Not only a promise to pay but the acknowledgment of a present subsisting debt may be implied from the language used. Hence, if an obligation barred by the statute of limitations is presented, accompanied by a demand for payment, to the maker, who says, "I cannot pay it now, as I have two members of my family now to support." there is an implied admission of a present subsisting debt and an implied promise to pay, removing the bar of the statute. (*Beeler v. Clarke*, 439.)

2. LIMITATION OF ACTIONS—CONFLICT OF LAWS.—Limitation of actions does not depend on the law of the place where the contract was made but on the law of the forum. (*Wright v. Mordaunt*, 536.)

3. LIMITATION OF ACTIONS—CONFLICT OF LAWS.—The law of the state where an action is brought consisting of a six year limitation bars a suit on a note made in another state in which the period of limitation is ten years, although both parties to the note resided in such other state at the time of its execution, and the maker did not become a resident of the state where suit was brought until nearly six years after the maturity of the note. (*Wright v. Mordaunt*, 536.)

4. LIMITATION OF ACTIONS—FACTORS AND AGENTS.—A factor in possession of funds belonging to his principal, when there is nothing in the contract or the custom of the place requiring that the funds should be paid over any particular time, cannot set up title to such funds without notice to the principal that he no longer holds them for his benefit. The statute of limitations

does not begin to run in his favor until such notice, or until there has been a demand and refusal to pay, or an account rendered accompanied by an offer to settle. (Teasley v. Bradley, 113.)

5. **LIMITATION OF ACTIONS—FACTORS AND AGENTS.**—If one person receives money from another from time to time, to invest and collect the principal or interest, and reinvest the money from time to time for the benefit of such other, and it is contemplated by the agreement between the parties that the person receiving the money shall use it for the benefit of such other, and there is no time specified when the money is to be returned, such person holds the fund subject to the demand of the other, and no limitation runs against the person owning the fund in favor of the person collecting it until there has been a demand and refusal, or such a lapse of time that the law presumes a demand and refusal, or until an account has been rendered, accompanied by an offer to settle, or the one in possession has notified the owner that he no longer holds the fund as the owner's, but claims title to it himself. (Teasley v. Bradley, 113.)

6. **LIMITATION OF ACTIONS.**—Trustees in technical trusts cannot, during the continuance of the trust, plead the statute of limitations against the claim of the cestui que trust. (Teasley v. Bradley, 113.)

7. **LIMITATION OF ACTIONS—AGENCY.**—If an agent is appointed for the sole purpose of collecting and paying over money, the statute of limitations begins to run in favor of the agent from the time that the fact that the collection has been made came to the knowledge of the principal. (Teasley v. Bradley, 113.)

8. **LIMITATIONS—LOANS.**—Money loaned with no agreement as to the time of repayment is due immediately, and the statute of limitations begins to run at once in favor of the borrower. (Teasley v. Bradley, 113.)

See County, 4; Husband and Wife, 7; Libel, 2; Mines, 2.

LIVESTOCK.

See Carrier, 1, 2.

LOTTERY.

1. **LOTTERY—GAMING.**—A lottery is gaming within the provisions of a city charter authorizing the city to prevent and suppress gaming. (Ex parte Kameta, 775.)

2. **LOTTERY — MUNICIPAL ORDINANCES — BURDEN OF PROOF.**—A municipal ordinance making it a criminal offense for any person to have a lottery ticket in his possession, unless such possession is shown to be innocent, or for a lawful purpose, is void, as casting the burden of proof upon the defendant to show his innocence. (Ex parte Kameta, 775.)

MALICIOUS PROSECUTION.

1. **MALICIOUS PROSECUTION — LEGAL ADVICE — STATUTE OF LIMITATIONS.**—An action for malicious prosecution cannot be maintained if it appears that such prosecution was commenced upon the advice of the district attorney, sought in good faith, and based on a full disclosure of all of the facts known to the prosecutor. The fact that the binding over was after the prosecution was barred by limitation does not make the prosecutor liable unless he persisted in such prosecution after he knew that it was barred. (Wenger v. Phillips, 810.)

2. MALICIOUS PROSECUTION—USE OF CRIMINAL PROCESS—PROBABLE CAUSE—EVIDENCE.—Proof that criminal process has been made use of as a means to collect a debt is not conclusive in establishing want of probable cause and the existence of malice in an action of malicious prosecution. It is prima facie only, and while sufficient to shift the burden of proof to the defendant, it may be rebutted by other proof. (*Wenger v. Phillips*, 810.)

3. MALICIOUS PROSECUTION—JOINDER OF DEFENDANTS.—Where a partnership, its individual members, and a third person conspire together to injure a plaintiff in instituting and carrying on a prosecution, all may be joined as defendants in an action for malicious prosecution. (Page v. *Citizens' Bank Co.*, 144.)

4. PLEADING.—IN AN ACTION FOR MALICIOUS PROSECUTION AGAINST A PARTNERSHIP, THE COMPLAINT should allege that the prosecution was instituted and carried on in furtherance of the partnership's interests, and it is therefore proper to allege exactly in what way the partnership was involved in the matter which was the foundation of the prosecution. (Page v. *Citizens' Bank Co.*, 144.)

5. MALICIOUS PROSECUTION.—A CRIMINAL PROSECUTION, to give rise to an action for malicious prosecution, must have been instituted without probable cause, maliciously carried on, and damage must have ensued therefrom. (Page v. *Citizens' Bank Co.*, 144.)

6. MALICIOUS PROSECUTION.—A CRIMINAL PROSECUTION HAS BEEN "CARRIED ON," so as to support an action for malicious prosecution, where, under the authority of a search warrant, the premises of the person named therein are searched and goods seized which are not described in the affidavit, and such person is arrested and carried before a magistrate, and after the prosecutor is allowed a reasonable time to secure evidence he fails to do so, and in open court announces that he cannot make out a case against the person arrested, and asks that an order be entered discharging the accused from custody and restoring to him the property wrongfully seized. (Page v. *Citizens' Bank Co.*, 144.)

7. MALICIOUS PROSECUTION.—A CRIMINAL PROSECUTION IS AT AN END when the prosecution announces in open court that it has no evidence to offer against the accused, and procures an order dismissing the warrant and discharging the accused from custody, and no further action is ever taken. (Page v. *Citizens' Bank Co.*, 144.)

8. PARTNERSHIP—LIABILITY FOR MALICIOUS PROSECUTION.—A partnership is liable in an action for malicious prosecution, united in by all the members for the purpose of furthering the interests of the partnership. (Page v. *Citizens' Bank Co.*, 144.)

MARKETS.

See *Municipal Corporations*, 9-13.

MARRIAGE AND DIVORCE.

1. MARRIAGE AND DIVORCE—MARRIAGE CONTRACT—BREACH OF.—A contract to marry upon the death of the divorced wife of one of the parties is not "void for indefiniteness and uncertainty." (*Brown v. Odill*, 914.)

2. MARRIAGE AND DIVORCE—MARRIAGE CONTRACT.—A contract between two persons to marry upon the death of the divorced wife of the man is neither void as being "in illegal restraint

of marriage," nor as being "against public policy." (Brown v. Odill, 914.)

3. MARRIAGE AND DIVORCE—BREACH OF PROMISE.—A promise of marriage, whenever to be consummated, cannot validly subsist after one of the parties has intermarried with a third person. (Brown v. Odill, 914.)

4. MARRIAGE AND DIVORCE—BREACH OF PROMISE.—A promise of a man to marry a certain woman on the death of his divorced wife is effectually broken, so as to give an immediate cause of action by his conceded marriage to a third woman while his divorced wife still survives. (Brown v. Odill, 914.)

5. MARRIAGE AND DIVORCE—BREACH OF PROMISE—MEASURE OF DAMAGES.—Plaintiff is entitled to recover for a breach of promise of marriage such an amount as will compensate her for the injury received. The elements of such damages are her disappointment of reasonable expectations of social, domestic, and material advantages to be derived from the promised marriage, the injury to her prospects in life, the wounds to her affections, and her mental anguish and mortification resulting from the wrongful breach of the contract. (Brown v. Odill, 914.)

6. MARRIAGE AND DIVORCE—BREACH OF PROMISE—DAMAGES.—If the verdict for damages for a breach of a promise to marry is not so great as to indicate prejudice, passion, caprice, or corruption on the part of the jury, it cannot be set aside for excessiveness. (Brown v. Odill, 914.)

7. MARRIAGE—NULLITY OF—VENEREAL DISEASE.—The concealed existence in one of the parties to a marriage of a venereal disease known as syphilis, which can be so treated that it will not be communicated to the other, is not a sufficient ground for a decree of nullity of marriage. (Vondal v. Vondal, 502.)

8. MARRIAGE AND DIVORCE—COMMON-LAW MARRIAGE.—If a man and woman are formally married while one of them is under a disability, and, after the removal of such disability, they determine to, and do continue to, live together in good faith as husband and wife without the performance of another marriage ceremony, such cohabitation constitutes a common-law marriage, and makes them legally husband and wife after such disability is removed. (Schuchart v. Schuchart, 342.)

9. MARRIAGE AND DIVORCE.—Cruelty, as cause for divorce is not confined to acts of personal violence, but includes such treatment as endangers health and renders cohabitation intolerable. (Gardner v. Gardner, 924.)

10. MARRIAGE AND DIVORCE—CRUELTY—EXCESSIVE INTERCOURSE.—A gross abuse by the husband of his marital rights, such as to compel his wife, a woman of delicate health, by threats, to submit to incessant and abnormal sexual intercourse, to the serious impairment of her health, is such cruelty as is ground for divorce. (Gardner v. Gardner, 924.)

11. MARRIAGE AND DIVORCE—CRUELTY—PARTIES AS WITNESSES.—Husband and wife are competent witnesses in divorce proceedings, and may testify in respect to any acts of cruelty offered the one by the other. (Gardner v. Gardner, 924.)

12. MARRIAGE AND DIVORCE—CRUELTY.—In an action for divorce founded on cruelty as the cause therefor, admissions or conversations by a husband relating to the treatment of his wife are admissible in evidence against him. (Gardner v. Gardner, 924.)

13. MARRIAGE AND DIVORCE—VACATING DIVORCE—ADULTERY.—After a decree of divorce has been set aside the prior.

marriage is in full force, and the husband, by thereafter having carnal knowledge of the body of his second wife, commits adultery. (State v. Watson, 871.)

14. JUDGMENTS—FRAUD IN OBTAINING—VACATION—DIVORCE.—Fraud of the party in whose favor a judgment is rendered and the innocence of the other party thereto are sufficient grounds for vacating the judgment. Divorce decrees are subject to this rule. (State v. Watson, 871.)

15. JUDGMENTS—DIVORCE DECREES—SETTING ASIDE FOR FRAUD.—Fraud of one of the parties in obtaining a decree of divorce is good ground for setting it aside. (State v. Watson, 871.)

16. MARRIAGE AND DIVORCE—DIVORCE IN ANOTHER STATE—DOMICILE—FRAUD.—A decree of divorce obtained in another state upon false allegations of domicile therein, is fraudulent and void in the state where the parties have their real domicile. (Streitwolf v. Streitwolf, 630.)

17. MARRIAGE AND DIVORCE—CRUEL TREATMENT.—The acts of a wife in failing to stay at home and take care of her sick husband, or in refusing to consent to his hiring a nurse so to do, and in neglecting to properly administer medicines to him, he being under the care of a physician and financially able to procure proper food and nursing, do not constitute such cruel and abusive treatment as will authorize a suit for divorce, though his health was temporarily injured thereby. (Bonney v. Bonney, 473.)

18. DOWER—RIGHT OF DIVORCED WIFE—STATUTORY CONSTRUCTION.—The statute of Ohio, giving to a divorced wife a right of dower in the real estate of the husband not allowed her as alimony, is enabling in its character. It creates no disability, nor does it impose any restraint on the power of the divorced wife to release her dower right, in any lawful mode, either when the divorce is granted or at any time thereafter. (Juller v. Juller, 697.)

19. DIVORCE—JURISDICTION—AGREEMENTS AS TO ALIMONY.—Under a prayer for general relief in an action for divorce, properly instituted, it is within the jurisdiction of the court to settle and adjust by its judgment the rights of the parties with respect to the amount and nature of the alimony that shall be awarded and the terms and conditions of its payment; and in doing so it may confirm and carry into effect, by its decree, any just and reasonable agreement between the parties concerning the same. (Juller v. Juller, 697.)

20. DIVORCE—ALIMONY IN LIEU OF DOWER—JURISDICTION TO ORDER RELEASE—DECREE AS A BAR.—Under the statute of Ohio the right of dower is preserved after a divorce granted by reason of the husband's aggression, but the parties to a suit for divorce in that state may agree between themselves that the wife shall have alimony in her husband's real estate in lieu of dower, and that the wife shall release her right of dower, and the court has jurisdiction, upon granting the divorce, to order the wife to execute such release, but if she fails to do so by the time appointed the decree will, under the statute of that state, operate as such release, and will bar her right of dower as effectually as if she had executed and delivered the release. (Juller v. Juller, 697.)

21. ESTOPPEL—AGREEMENT TO ACCEPT ALIMONY IN LIEU OF DOWER.—A wife, who has made a just and reasonable agreement, in a divorce suit, concerning an allowance of alimony to her in lieu of dower, which agreement has been confirmed and carried into effect by the court, in its decree, is, at least so long as the decree remains in force, estopped from alleging or proving that

he agreement was unlawful, as contravening public policy. (Julier v. Julier, 697.)

22. DOWER—ACTION FOR, BY DIVORCED WIFE—DECREE OF DIVORCE AS A BAR.—If a wife, by agreement with her husband, accepts alimony in lieu of dower in her husband's real estate, and the agreement is confirmed and carried into effect by the court, in its decree, wherein the wife is ordered to execute, within a certain time, a release of her dower right, but she fails to do so and sues for dower after receiving the alimony awarded, the decree is a legal bar to the action, although the agreement was pleaded and proved in support of the defense, it being neither necessary to establish the defense nor competent to invalidate the decree. (Julier v. Julier, 697.)

23. DIVORCE—IGNORANCE OF PROVISIONS OF DECREE AND ATTORNEY'S WANT OF AUTHORITY—PLEA OF—WHEN INAVAILING.—A wife who has accepted and, for more than ten years, retained the fruits of a decree allowing her alimony in lieu of dower in her husband's real estate, and which decree was taken by her attorney of record, cannot, where no fraud or collusion is charged, be released from the obligation of the decree on the ground that she was ignorant of its provisions as entered of record, or that her attorney was without authority to have it so entered. (Julier v. Julier, 697.)

MASTER AND SERVANT.

1. MASTER AND SERVANT—FELLOW-SERVANTS—HOW DETERMINED.—The character of the act, and not the rank of the person performing it, furnishes the test by which to determine whether in the performance thereof the person acting is the representative of the master or a fellow-servant. (Morgridge v. Providence Tel. Co., 879.)

2. MASTER AND SERVANT—FELLOW-SERVANTS—SUPERINTENDENT AND WORKMAN.—A superintendent of a telephone company in directing workmen to let go their hold on a telephone pole which they are raising is a fellow-servant with them, when the order might as well have been given by any other employé as by such superintendent. In giving such order the superintendent does not perform any act on behalf of the company which legally devolves upon it to perform. (Morgridge v. Providence Tel. Co., 879.)

3. MASTER AND SERVANT—DEFECTIVE TOOLS.—An employé cannot recover for injury resulting from a defect in a tool used by him in the customary manner, of a kind in general use, procured from and tested by a reputable manufacturer, and approved as sound by the employé's superintendent, as well as by the employé himself. (Kent v. Yazoo etc. R. R. Co., 534.)

4. MASTER AND SERVANT—SAFEST APPLIANCES.—A railroad company is not negligent in failing to use the safest known appliances, if those furnished are such as are in general use, and are reasonably safe. (Kent v. Yazoo etc. R. R. Co., 534.)

5. CONTRACTS—ENTIRETY.—If an employer makes a contract to pay a certain sum for a season's labor, and at the end of the first month pays for that month's services, he is estopped, when sued for the second month's wages, to assert that the contract is entire, and that he is not to pay for services until those for the whole season are rendered. (Ramsey v. Brown, 520.)

6. BLASTING—LIABILITY FOR—INDEPENDENT CONTRACTOR.—A defendant is liable for an injury to the plaintiff's property by the blasting of rocks upon the adjoining land of the defendant, and it is no defense that the work was in the hands of an

independent contractor, where blasting was contemplated by the contract, and its performance was certain to cause the injury complained of unless it was guarded against. (*Wetherbee v. Partridge*, 486.)

See Assignment.

MAXIM.

MAXIMS.—"THE PUBLIC WELFARE IS THE HIGHEST LAW," is the foundation principle of all civil government. (*State v. Hay*, 691.)

MINES AND MINING.

1. MINES AND MINING—VALIDITY OF LOCATION.—If, at the time of the location of a mining claim, notice is posted thereon and subsequently recorded, and the claim is marked by monuments, so that its boundaries can be readily ascertained, the location is valid. (*Risch v. Wiseman*, 783.)

2. MINES AND MINING—CLAIMS—PRESCRIPTIVE TITLE. If a person has held, occupied, and possessed mineral land under color of title, in pursuance of law and the local rules and regulations of the mining district for more than twenty years prior to an attempted adverse location, it is not then public mineral land, and such attempted location may be enjoined. (*Risch v. Wiseman*, 783.)

3. MINES AND MINING—PRESUMPTION.—The possessor of a mining claim in a mining district is presumed to be the owner thereof. (*Risch v. Wiseman*, 783.)

MINORS.

See Infants.

MISTAKE.

1. EQUITY JURISDICTION.—MISTAKE IN LAW is not beyond the reach of equity, and if all parties understood the law alike, all making the same mistake, which operated to deprive one of the parties of a valuable right, and to give the other a material advantage not contemplated by either, a court of equity may adjust their property rights as though the law relating thereto was, in fact, as the parties supposed it to be, if that becomes necessary in order to do justice between them. (*Benson v. Bunting*, 81.)

2. CONTRACTS—MISTAKE—IMPOSSIBLE CONDITION.—If a person contracts to construct and furnish a flouring-mill that will produce a result measured by a certain standard assumed by both parties to exist, when in fact no such standard does or can exist, the contract is impossible of fulfillment and unenforceable. (*Nordyke etc. Co. v. Kehlor*, 600.)

3. CONTRACTS—MISTAKE.—If an attempted contract assumes the existence of, and is based upon the existence of, an essential fact which does not exist, there is no meeting of the minds of the parties in reality, and no contract that can be enforced by either. (*Nordyke etc. Co. v. Kehlor*, 600.)

4. CONTRACTS—MISTAKE—IMPOSSIBLE CONDITION.—If by mutual mistake a contract is founded upon a condition impossible of performance because of the assumption of the existence of a fact which cannot exist, and its adoption by both parties as the sole standard by which to test the performance of the condition, the contract cannot be enforced, and it is immaterial who furnished the information upon which the condition is predicated, or that the

person pleading the mistake had the means of discovering it, or by care and diligence might have avoided it. (Nordyke etc. Co. v. Kehlor, 600.)

5. **CONTRACTS — MISTAKE — IMPOSSIBLE CONDITION—QUANTUM MERUIT—ABANDONMENT.**—If by mutual mistake a contract is founded upon a condition impossible of performance, one of the parties, upon discovering that fact, is not compelled to proceed with his part of the contract and trust to a recovery on a quantum meruit for his services. Upon such discovery he may abandon the contract. (Nordyke etc. Co. v. Kehlor, 600.)

MOB.

1. **CONSTITUTIONAL LAW—STATUTE FOR SUPPRESSION OF MOB VIOLENCE—VALIDITY OF.**—A legislature is authorized, under its general police power, the general taxing power, and its power to prescribe local taxation for commissioners of counties, to pass an act "for the suppression of mob violence," authorizing the recovery of a fixed penalty against the county in which a lynching takes place, and an order to be made on the county commissioners to include the same in the next succeeding tax levy. Such legislation, not being an exercise of judicial power, nor in contravention of the right of private property, or of the right of trial by jury, is constitutional, though the money is turned over to those who suffer by the act of lynching. (Board of Commissioners v. Church, 718.)

2. **CONSTITUTIONAL LAW—INDIVIDUAL RIGHTS.**—Even a criminal has some rights which cannot be forfeited. Every person accused of crime is guaranteed a fair trial. He cannot be deprived of life or liberty without due process of law, and it is the duty, primarily, of local authorities to make good the constitutional guaranties to the individual, but if a large number of the people of any county become imbued with the lynching spirit, the state must intervene to protect him. (Board of Commissioners v. Church, 718.)

3. **INSTRUCTIONS IN ACTION FOR INJURY BY MOB—WHEN ERRONEOUS.**—In an action to recover a statutory penalty for the death of a person caused by lynching, it is erroneous to instruct the jury, in substance, that, if the collection of persons who lynched the deceased had assembled without any unlawful purpose, and afterward committed the acts of violence resulting in his death, the plaintiff cannot recover, and that the verdict should be for the defendant, for the persons of an assembly, though lawfully assembled, may unite in unlawful conduct and thus become rioters. (Board of Commissioners v. Church, 718.)

4. **PLEADING IN ACTION FOR STATUTORY PENALTY—PETITION—SUFFICIENCY OF—MOB VIOLENCE.**—In an action to recover a statutory penalty for an injury received at the hands of a mob, the petition is sufficient where it clearly alleges that the plaintiff and his fellow workmen were assaulted by a collection of individuals, who had assembled for an unlawful purpose, and tried "to exercise correctional power" over the plaintiff and his fellows, without any authority of law, and that thus and thereby the plaintiff suffered a lynching at the hands of such mob, although it contains averments that the plaintiff was struck by "a heavy glass insulator, thrown at him by one of the mob," and was "shot through the leg with a leaden bullet, fired from a revolver in the hands of some of the mob," as such details are not inconsistent with the more general averments contained therein. (Board of Commissioners v. Church, 718.)

MONOPOLY.

1. CORPORATIONS—POWER OF PURCHASE.—A corporation may lawfully purchase the plant and business of competing individuals and corporations, if authorized so to do by the statute under which they are created, although such purchase may diminish, or, for a time at least, destroy competition, and create a monopoly. (Trenton Potteries Co. v. Oliphant, 612.)

2. CONTRACTS IN RESTRAINT OF TRADE—PURCHASE BY CORPORATION.—A contract by a corporation, having legislative authority, for the purchase of competing plants and business, as well as a contract incidental thereto and reasonably necessary to make such purchase effective by protecting the purchaser in the use and enjoyment of the business purchased, may be made and is enforceable, although as a result thereof competition is diminished or temporarily destroyed, and such contracts cannot be declared by the courts to be repugnant to public policy and void, although they tend to produce, and may temporarily produce, a monopoly of the business thus purchased. (Trenton Potteries Co. v. Oliphant, 612.)

3. CONTRACTS IN RESTRAINT OF TRADE—TRUSTS.—Contracts by independent and unconnected manufacturers of or traders in a public commodity looking to the control of the price thereof, either by limitation of production or by restriction on distribution, or by express agreement to maintain specified prices, are opposed to public policy and void as creating a trust or monopoly. (Trenton Potteries Co. v. Oliphant, 612.)

4. CONTRACTS IN RESTRAINT OF TRADE—MONOPOLY.—A contract of purchase by one person of five distinct manufactories of a public commodity, containing a stipulation by each of the five vendors not to engage in a competitive business for a long period of time and over a great extent of country, is not void as creating a monopoly, or as being in restraint of trade, provided such stipulation is reasonably necessary to protect the purchaser in the enjoyment of the business. (Trenton Potteries Co. v. Oliphant, 612.)

5. CONTRACTS IN RESTRAINT OF TRADE—MONOPOLY BY PURCHASE.—A person engaged in any lawful manufacture or trade may lawfully buy the business of any and all of his competitors, although the effect of such purchase is to diminish or even to exclude competition. (Trenton Potteries Co. v. Oliphant, 612.)

See Statutes, 12.

MORTGAGES.

1. MORTGAGES—JUNIOR ENCUMBRANCERS—RIGHTS OF, HOW BARRED.—The rights of a junior lien creditor who has not been made a party to the foreclosure of a senior lien may be barred by a suit for strict foreclosure requiring him to redeem within a reasonable time or stand foreclosed. (Koerner v. Willamette Iron Works, 759.)

2. MORTGAGES—DISCHARGE OF SECURITY—INVALID SALE BY MORTGAGEE.—Where land, mortgaged as security for a debt, is discharged from the payment of such debt by reason of the extension of time of payment, the mortgagee has no right to sell under the mortgage, and a purchaser at such a sale acquires no greater right than he would at a sale by a mortgagee after the debt was paid; and this right, though accompanied by possession, cannot ripen into a good title as against parties who are under the disability of infancy and coverture. (Fleming v. Barden, 671.)

3. MORTGAGES--DISCHARGE BY EXTENDING TIME OF PAYMENT OF DEBT.—Where a mortgage is executed for a debt of the husband by the husband and his wife, and a trustee who holds the land for the wife's benefit, an agreement between the mortgagee and the debtor to extend the time of payment of the debt has the effect to discharge the mortgage by operation of law, notwithstanding the fact that the wife was dead at the time the agreement was made. (*Fleming v. Barden*, 671.)

4. MORTGAGES—FORECLOSURE SALE—EQUITABLE ESTOPPEL.—If mortgaged property is of sufficient value to pay the mortgage debt, and the mortgagee permits the property to be sold under foreclosure in order that his representative may purchase it for less than its fair market value, such mortgagee is equitably estopped from recovering the balance due on the mortgage note. (*Island Sav. Bank v. Galvin*, 846.)

5. MORTGAGE SALE—LEVY ON EQUITY OF REDEMPTION—PURCHASE AT FORECLOSURE BY MORTGAGOR.—Where a mortgagor's equity of redemption has been levied upon, a subsequent purchase of the property by him at foreclosure sale operates as a conveyance of the title to him, and not as a discharge or release of the mortgage, and hence a deed given by virtue of a subsequent sale of the equity of redemption which had been levied upon is of no effect. (*Lunt v. Cook*, 472.)

6. REDEMPTION—CHANGE IN THE LAW.—The statutory time within which redemption from mortgage foreclosures must be effected is fixed by the statute in force at the time that the mortgage is executed, and not by one subsequently enacted. (*Benson v. Bunting*, 81.)

7. MORTGAGES—FORECLOSURE—REDEMPTION—FRAUD. If the purchaser at a mortgage foreclosure sale employs the mortgagor's attorney to make the bid for him, and through such attorney misrepresents to the mortgagor that he has one year in which to redeem, and he, relying thereon, neglects to redeem within the statutory period of six months, but tenders full redemption within one year, a refusal to accept such tender operates as a fraud upon him, and entitles him to equitable relief, no matter whether such misrepresentations were fraudulently or honestly made. In such case the purchaser is estopped to insist upon the statutory period for redemption, although the assurances were not in writing, and were made without consideration. (*Benson v. Bunting*, 81.)

See Attachment. 1: Corporations, 23, 24; Crops, 2, 3; Dower; Executors and Administrators, 4; Fraudulent Conveyance, 8.

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATIONS—CONTRACTS OF, WITH THEIR OWN OFFICERS.—The election by a city board of aldermen of one of its own members to be "street boss," at a stated compensation, such member participating in the meeting at which he was elected, is against public policy, and the contract for services is void and unenforceable. (*Snipes v. Winston*, 666.)

2. MUNICIPAL CORPORATIONS—ELECTION BY CITY COUNCIL, WHEN COMPLETE—RECONSIDERATION OF.—When the vote of a city council for the election of a city clerk has been cast, and the result announced to the council by the clerk, the right of one who has received a plurality of the votes cast to be inducted into the office is fixed eo instanti, without any formal declaration of the result by the mayor as presiding officer of the council. The election is then complete, and members of the coun-

cell cannot afterward lawfully change the result by changing their votes. (*State v. Miller*, 732.)

3. MUNICIPAL CORPORATIONS—MAYOR—DUTY AND POWER OF, IN CITY ELECTIONS.—Under a statute which makes the mayor of a city the presiding officer of the city council, and which does not provide for his participation in a city election except in case of a tie vote, he is not a member of the council and has no duty to perform, as to such election, except in the case of a tie vote. He can take no part therein, unless such contingency arises, and it is, therefore, unnecessary for him to declare the result. (*State v. Miller*, 732.)

4. MUNICIPAL CORPORATIONS—PESTHOUSES—DAMNUM ABSQUE INJURIA.—Supposed damages growing out of the proper exercise of the police power must be considered *damnum absque injuria*. Hence a city, having express statutory authority to erect hospitals, may establish a smallpox hospital on its own property, without violating a constitutional guaranty that private property shall not be damaged for public use without just compensation; and no action for damages will, therefore, lie for injury to property in the neighborhood, where such hospital is rightfully located and well conducted. (*Frazer v. Chicago*, 296.)

5. MUNICIPAL CORPORATIONS—LIABILITY FOR BURNING HOUSE.—A city or town is not liable to a plaintiff in tort for the burning of his house, where its officers were acting for the benefit of the state at large, and they unreasonably exceeded the powers conferred on them by law. (*Prichard v. Board of Commissioners*, 679.)

6. MUNICIPAL CORPORATIONS—WHEN LIABLE FOR AGENTS' ACTS.—Towns and cities are, as a general rule, liable for the negligent discharge, by their officers and agents, of specific duties imposed by law, or when such authorities are acting within the scope of their authority in the management of their property for their own interest, or in the exercise of powers voluntarily assumed for their own advantage, even though such work inures to the benefit of the municipality. (*Prichard v. Board of Commissioners*, 679.)

7. MUNICIPAL CORPORATIONS—WHEN NOT LIABLE.—In the absence of statute, a city or town incurs no liability for the negligence of its officers, where they are exercising the judicial, discretionary, or legislative authority conferred by its charter. (*Prichard v. Board of Commissioners*, 679.)

8. MUNICIPAL CORPORATIONS—POWER TO SUPPRESS GAMING.—A city authorized by its charter to prevent and suppress gaming and gambling-houses within its limits is vested with power to punish and suppress gaming as a substantive offense. (*Ex parte Kameta*, 775.)

9. MUNICIPAL CORPORATIONS—POWER TO CONFINE BUSINESS TO DESIGNATED LOCALITY.—A municipality has no general or implied authority to suppress or confine a lawful business to a designated locality when such business is not a nuisance per se, and the statute under which the municipality acts only confers authority in specific terms to prescribe regulations whereby the place in which such business is conducted shall be kept clean and in good order. (*Crowley v. West*, 355.)

10. MUNICIPAL CORPORATIONS—UNREASONABLE ORDINANCES.—A municipal ordinance which permits certain livery-stables to be maintained in the business center of the city, while another stable and all others thereafter erected are confined to a

designated locality remote from such business center, is an unreasonable discrimination and unconstitutional and void. (*Crowley v. West*, 355.)

11. MUNICIPAL CORPORATIONS—ORDINANCES REGULATING MARKETS.—The state has the right to regulate markets for the sale of produce, and it may delegate that power to the municipalities in which such markets are situated, and in such case ordinances adopted for that purpose are not ultra vires, and must be sustained when not unreasonable, discriminative, nor oppressive. (*New Orleans v. Graffina*, 387.)

12. MUNICIPAL CORPORATIONS—POWER TO REGULATE PRODUCE MARKETS.—The right in a municipality to establish a public market necessarily covers the right to prevent the establishing of private markets, and the right to prevent the sale of market commodities within the police regulations of the city for sanitary purposes and for convenience. (*New Orleans v. Graffina*, 387.)

13. MUNICIPAL CORPORATIONS—POWER TO REGULATE PRODUCE MARKETS.—A city having power to establish public markets has power to prevent the establishing of private markets, and to prohibit the sale of provisions and articles of daily consumption by peddlers. (*New Orleans v. Graffina*, 387.)

14. MUNICIPAL CORPORATIONS—ORDINANCES—PRESUMPTION.—It is presumed that an ordinance passed by a city under its power to regulate produce markets is reasonable and not oppressive. (*New Orleans v. Graffina*, 387.)

15. MUNICIPAL CORPORATIONS—OPENING IN SIDEWALK—NUISANCE—NEGLIGENCE.—An opening in the sidewalk of a public street of a city, if properly constructed, is not a nuisance, but persons negligently using it are liable for injury resulting therefrom, and a person thus injured may recover of the persons guilty of such negligent use or the city, or both. (*Pawtucket v. Bray*, 837.)

16. MUNICIPAL CORPORATIONS—JUDGMENT AGAINST WHEN CONCLUSIVE ON PARTY LIABLE TO CITY.—If a person injured by reason of the negligence of a third person, in the use of an opening in a sidewalk in a public street, not in itself a nuisance, has sued and recovered therefor from the city, the latter has its action over against such person guilty of the negligence, and he, having been duly notified to defend the original suit, is bound by the judgment therein. (*Pawtucket v. Bray*, 837.)

17. NEGLIGENCE—EXCAVATION IN SIDEWALK—LIABILITY OF TOWN AND PROPERTY OWNER.—Where a property owner makes an excavation in the sidewalk, which was known to the authorities of the town, and the excavation is negligently left unguarded, so that a person, without fault of his own, falls into it and is badly hurt, such person may sue the party making the excavation and also the town for permitting the sidewalk to remain in a dangerous condition. (*Brown v. Louisburg*, 677.)

See Interest, 1-3; Lottery, 2; Negligence, 2.

NATIONAL BANKS.

See Attachment, 2, 2.

NAVIGABLE WATERS.

See Waters and Watercourses.

NECESSARIES.

See Husband and Wife, 1.

NEGLIGENCE.

1. NEGLIGENCE—LIABILITY OF OWNER OF DEFECTIVE PROPERTY—CHANGED POSSESSION.—When a person is to be charged because of the construction or ownership of an object which causes damage by some defect, commonly the liability is held to end when the control of the object is changed. (*Glynn v. Central R. R. Co.*, 507.)

2. NEGLIGENCE—WHEN QUESTION FOR JURY.—Circumstances may beget duties, which, under ordinary circumstances, cannot be implied, and if such circumstances are shown to exist, the question of negligence arising therefrom is not for the court, but for the jury. (*Corbin v. Philadelphia*, 825.)

3. NEGLIGENCE—TRENCHES FILLED WITH SEWER GAS. It is the duty of a city, upon discovering dangerous gas in sewer trenches dug by it, and the harmful effect of such gas upon its workmen, to give notice and warning of its presence to the public, and to promptly take steps to prevent anyone from descending into such trenches, especially when such descent may be made innocently, naturally, and lawfully from a variety of causes. A neglect of such duty on the part of the city is negligence. (*Corbin v. Philadelphia*, 825.)

4. NEGLIGENCE—ATTEMPT TO SAVE LIFE.—A rescuer who, from the most unselfish motives, prompted by the noblest impulses that can impel man to deeds of heroism, faces deadly peril, ought not to hear from the law words of condemnation of his bravery, because he rushes into danger to snatch from it the life of a fellow creature, imperiled by the negligence of another, but he should rather listen to words of approval, unless regretfully withheld on account of the unmistakable evidence of his rashness and imprudence. (*Corbin v. Philadelphia*, 825.)

5. NEGLIGENCE—ATTEMPT TO SAVE LIFE.—The law has so high a regard for human life that it will not impute negligence to an effort to save it, unless made under circumstances such as to constitute rashness in the judgment of prudent persons. (*Corbin v. Philadelphia*, 825.)

6. NEGLIGENCE—ATTEMPT TO SAVE LIFE.—For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence, which will preclude a recovery for an injury so received; but when the exposure is for the purpose of saving human life, it is not wrongful, and therefore not negligent, unless such as to be regarded either as rash or reckless. (*Corbin v. Philadelphia*, 825.)

7. NEGLIGENCE—ATTEMPT TO SAVE LIFE.—The law does not impute negligence to an attempt to preserve human life if such effort is made with a reasonable regard for the rescuer's own safety, and, where negligence on the part of the defendant is shown, the negligence of the person in danger cannot be imputed to the rescuer. (*Corbin v. Philadelphia*, 825.)

8. NEGLIGENCE—ATTEMPT TO SAVE LIFE—QUESTION FOR JURY.—It is not negligence per se for a person to voluntarily risk his own life or safety in attempting to rescue another from impending danger. The question whether one so acting should be charged with contributory negligence, in an action brought by him to recover for personal injury received in attempting the rescue,

is one of mixed law and fact, and should be submitted to the jury, upon the evidence, under proper instructions. (*Corbin v. Philadelphia*, 825.)

9. **NEGLIGENCE.—ONE WHO IMPERILS HIS OWN LIFE** for the purpose of rescuing another from impending danger is not chargeable, as matter of law, with contributory negligence, and if the life of the rescued person is endangered by the negligence of the defendant, the rescuer may recover for the injury received from the defendant in consequence of his intervention. (*Corbin v. Philadelphia*, 825.)

10. **TRIAL—QUESTION OF LAW AND FACT.**—What is due diligence or reasonable care is generally, if not always, a mixed question of law and fact. (*Hendricks v. Western Union Tel. Co.*, 358.)

See Carriers, 1; Damages, 2-5; Electric Companies; Factors; Highways, 8-10; Husband and Wife, 6, 7; Municipal Corporations, 15, 17; Railroads, 1, 2; Telegraph Companies; Telephone Companies.

NEGOTIABLE INSTRUMENTS.

1. **NEGOTIABLE INSTRUMENTS.—ATTORNEYS' FEES**, provided for in a note in case of suit thereon, are in the nature of special damage. (*De Jarnatt v. Marquez*, 90.)

2. **NEGOTIABLE INSTRUMENTS—STIPULATION NOT AFFECTING NEGOTIABILITY.**—A note for the payment of a sum certain, at a fixed date, is negotiable, although it stipulates that upon default in the payment of interest the whole amount should become due at the option of the holder and then draw a greater rate of interest. (*Clark v. Skeen*, 337.)

3. **NEGOTIABLE INSTRUMENTS—STIPULATION NOT AFFECTING NEGOTIABILITY—EXCHANGE.**—A note for the payment of a sum certain, with current exchange on a place other than the place of payment, is negotiable. (*Clark v. Skeen*, 337.)

4. **NEGOTIABLE INSTRUMENTS—PRESUMPTION FROM POSSESSION.—BURDEN OF PROOF.**—Possession of a negotiable note properly indorsed is prima facie evidence that the holder is the owner thereof, that he acquired it in good faith and for value in the usual course of business before maturity, without notice of any circumstances impeaching its validity. The burden of proof is on the drawer of the note to show to the contrary. (*Clark v. Skeen*, 337.)

NEW TRIAL.

1. **NEW TRIAL—MOTION FOR—SUFFICIENCY OF.**—Under a statute which provides that, if the "decision" is not sustained by sufficient evidence, or is contrary to law, it shall be a ground for a new trial, a motion for a new trial, in a cause tried by the court, upon the ground that the "judgment" is not sustained by sufficient evidence and that it is contrary to law, is sufficient to bring up the evidence in the record for review. (*Buckeye Pipe Line Co. v. Fee*, 743.)

2. **NEW TRIAL—MISCONDUCT OF COUNSEL.**—A groundless and wholly unjustifiable attack by counsel upon a party to a cause on trial before a jury is calculated to prejudice their minds and prevent them from impartially weighing the evidence, and is ground for a new trial. (*Parker v. Providence Carriage Co.*, 878.)

NOVATION.

See Corporations, 16.

OFFICERS.

1. OFFICE—INJUNCTION TO TRY TITLE TO.—A court of equity is without jurisdiction to hear and determine the right or title of a person to a public office in a suit by injunction, when the only property rights to be affected by such injunction are such as flow from the lawful incumbency of such office. A writ of prohibition may issue to prevent the equity court from proceeding in the matter. (Arnold v. Henry, 556.)

2. OFFICE—INJUNCTION TO TRY TITLE TO.—A court of equity has no jurisdiction to try the title to a public office, whether the incumbent is an officer de jure or an officer de facto. Courts of law furnish ample remedies for such purpose. (Arnold v. Henry, 556.)

3. OFFICERS—LIABILITY FOR STOLEN FUNDS.—Public officers are liable on their official bonds for the absolute safety of all money coming into their hands by virtue of their office, unless it is lost by the act of God or the public enemy. They are liable for its theft by a third person, and it is no defense that it was stolen without the officer's fault. (Arnold v. State, 533.)

4. OFFICIAL BONDS—CONTINUING LIABILITY.—Where there is a recital in a bond specifying the time during which the prescribed duty is to be performed by the principal, and the words of the condition are general and indefinite as to the time for which the surety is to be liable, such general words will be construed as limited by the recital, and the surety will be held liable only for the time therein specified. (O'Brien v. Murphy, 487.)

5. OFFICIAL BONDS—CONSTRUCTION—CONTINUING LIABILITY.—The bond of a treasurer, whose office is held by annual election, the bond being given while he was holding office under his first election, does not become a continuing bond by inserting a provision that such treasurer shall perform his duties during the term for which he has been elected, "and during such further time as he may continue to hold said office and until he shall deliver all the property which he may receive as such treasurer to his successor in office," such phrase merely applies to such further time beyond the term of one year as the principal might hold office by virtue of his first election, and it was not intended to cover the time under which he might hold office under any subsequent election. (O'Brien v. Murphy, 487.)

6. CONSTABLE'S BOND—LIABILITY OF SURETIES—TRESPASS.—There can be no recovery against the sureties on the official bond of a constable for the latter's illegal acts done under a void distress warrant, for he is a mere trespasser. (State v. Timmons, 417.)

7. OFFICIAL BONDS—ACTIONS ON—HOW TO BE BROUGHT.—A suit, for any official delinquency, on a bond given to the state, must be in its name, for the use of the party injured, but the remedy against an officer who acts as a mere trespasser is against him individually as a tortfeasor. (State v. Timmons, 417.)

8. CONSTABLES—ACTS DONE UNDER VOID WARRANT OF DISTRESS—LIABILITY FOR.—A distress warrant for rent, issued without the affidavit required by statute, is void, and a constable who seizes and sells property under it is liable as a trespasser, but his sureties are not answerable for any acts done under it. (State v. Timmons, 417.)

9. **OFFICERS—REMOVAL.**—The legislature may authorize the employment of persons to perform certain duties in their nature public, to be prescribed by the authority appointing them, and may provide that they shall not be removed without just cause, if the employment is not an office within the meaning of the constitution, but it has no power to make such provision in relation to a public officer whose tenure of office is during the pleasure of the appointing power. (Patton v. Board of Health, 66.)

10. **AN OFFICE IS A PUBLIC POSITION** created by the constitution or law, continuing during the pleasure of the appointing power or for a fixed term, with a successor elected or appointed. An employment is an agency for a temporary purpose, ceasing when that purpose is accomplished. (Patton v. Board of Health, 66.)

11. **OFFICERS—WHO ARE.**—If the legislature creates the position, prescribes the duties, and fixes the compensation, and such duties pertain to the public and are continuing and permanent, and not occasional or temporary, the position or employment is an office, and he who occupies it is an officer. (Patton v. Board of Health, 66.)

12. **OFFICERS—HEALTH INSPECTOR—REMOVAL WITHOUT CAUSE.**—A health inspector required to be appointed by a board of health, whose duties are fixed by such board, and whose salary is provided for by law, is a public officer within the meaning of the constitution, and if his tenure of office is not fixed, but is subject to the pleasure of such board, he may be removed from office without just cause or an opportunity to be heard. (Patton v. Board of Health, 66.)

OPTIONS.

See Contracts, 3; Police Power, 3; Statutes, 19.

PARTIES.

ACTIONS.—PARTIES, in the larger legal sense, are all persons having a right to control the proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from the decision, if any appeal lies. (Walker v. Philadelphia, 801.)

PARTITION.

PARTITION—LIFE TENANT AND REMAINDERMEN.—A life tenant of lands cannot maintain an action for partition against the remaindermen, and a judgment in such case setting part of the land over to the life tenant in fee is absolutely void, and subject to collateral attack. (Love v. Blauw, 334.)

PARTNERSHIP.

1. **PARTNERSHIP—LOSS OF CAPITAL—CONTRIBUTION.**—Whatever may be the legal liability of partners to outside persons, as among themselves a disproportionate interest as to profits and losses may be agreed on. Hence, if one partner supplies all the capital of the firm, and the others furnish their time, services, and skill, under an agreement that they shall be entitled only to a share of the profits after payment of debts, but with no understanding among the parties that losses shall be made good by the joint contribution of all the partners, any impairment of the capital must, upon liquidation of the business, be borne alone by the partner who supplied it. (Baker v. Safe Deposit etc. Co., 463.)

2. PARTNERSHIP LIABILITIES—ACCORD AND SATISFACTION OF—WHAT IS NOT.—In a controversy between the executor of a deceased partner and the surviving partners, the executor claiming that they are answerable for certain losses or debts of the firm, which liability they deny, an agreement, though approved by the court, whereby the surviving partners convey to the executor their interest in certain firm property, does not operate as an accord and satisfaction of the partnership liabilities, where it is explicitly stated therein that the agreement shall not be conclusive upon the question as to whether the surviving partners are personally answerable for the liabilities of the firm. (*Baker v. Safe Deposit etc. Co.*, 463.)

3. PARTNERSHIP—LOSS OF CAPITAL—CONTRIBUTION—WHEN NOT ENFORCEABLE.—If a father forms a partnership with his sons, he alone supplying the capital, and they furnishing their services, and, upon the father's death and dissolution of the firm, there is a loss of capital after all debts are paid by the executor, the latter cannot, upon a bill filed by him against the surviving partners for contribution, compel them to contribute toward such loss, where it appears from the evidence, there being no written articles of partnership, that the sons were never credited with any interest in the firm property, but only with a percentage of net profits; and that all firm debts were payable, primarily, from profits, and, if these were not adequate, then out of the capital; for this clearly shows that it was not intended for the sons to contribute toward a loss of capital. (*Baker v. Safe Deposit etc. Co.*, 463.)

See Corporations, 15-17; Husband and Wife, 5; Malicious Prosecution, 3-8; Slander.

PASSENGERS.

See Carrier.

PENALTY.

STATUTES, PENAL—CONSTRUCTION.—If a statute creates a new duty and imposes a penalty for failure to perform it, the penalty so prescribed is the exclusive remedy for its breach. (*Utley v. Hill*, 569.)

PESTHOUSE.

See Municipal Corporations, 4.

PHYSICIAN.

PHYSICIANS—EVIDENCE—NECESSITY FOR VISITS.—A physician called to treat a patient must determine how often his visits should be made, and so long as the patient accepts his services, and does not discharge him, or require him to come less frequently, or fix the times when he wishes him to attend, he cannot be heard to say that the physician came oftener than was necessary. Hence, in an action for his services, the physician is not required to prove the necessity of making the number of visits he did. (*Abner v. Mackey*, 280.)

PLRA.

See Pleading, 7-10.

PLEADING.

1. PLEADING AND PRACTICE.—An affirmative allegation of a complaint not specifically denied is admitted, and an affirmative

allegation of the answer thereto inconsistent therewith is properly stricken out. (Capital Lumbering Co. v. Learned, 792.)

2. PLEADING—DEMURRER.—A complaint setting forth a legal cause of action, though using words and terms appropriate to an equitable proceeding, in so far as it does not seek any extraordinary relief, is not demurrable on the ground that plaintiff has an adequate remedy at law. (Teasley v. Bradley, 113.)

3. PRACTICE.—WHERE DEMURRERS ARE FILED to both the complaint and the answer, the proper practice is to consider the demurrer to the complaint first, and, if this is sustained, the demurrer to the answer need not be considered. (Page v. Citizens' Banking Co., 144.)

4. PLEADING—DEMURRER—MISJOINDER OF CAUSES OF ACTION.—A complaint is not demurrable on the ground of misjoinder of causes of action where they all grow out of the same transaction. (Prichard v. Board of Commissioners, 679.)

5. STATUTE OF FRAUDS—PLEADING.—IN ENGLAND the statute of frauds, 29 Charles II, does not affect the substance of contracts which come within its purview; hence, in order to take advantage of the statute a defendant must properly plead it. (Jordan v. Greensboro Furnace Co., 644.)

6. STATUTE OF FRAUDS—HOW SET UP—PLEADING.—IN NORTH CAROLINA the statute of frauds affects the contract itself, and hence if the plaintiff declares upon a verbal promise, void under the statute, the defendant may either deny that he made the promise, or set up a different contract, or admit the promise and specially plead the statute, and testimony offered by the plaintiff to prove the promise is incompetent, and should be excluded on objection. (Jordan v. Greensboro Furnace Co., 644.)

7. CRIMINAL PLEADING REQUIRES THAT A PLEA to the jurisdiction shall precede the plea of not guilty. If the special plea is determined against the defendant, he may then be allowed to plead over. (State v. Watson, 871.)

8. CRIMINAL PLEADING.—AFTER PLEA OF NOT GUILTY, the defendant cannot file any other plea without leave of court. (State v. Watson, 871.)

9. CRIMINAL PLEADING.—PLEA OF AUTREFOIS CONVICT must allege that the two offenses are the same, and if the offenses charged in the two indictments are distinct, though committed concurrently, they may be separately prosecuted. (State v. Watson, 871.)

10. CRIMINAL LAW.—MOTIONS TO QUASH INDICTMENTS or other criminal process are addressed alone to the discretion of the trial court, and can be granted only for defects apparent on the record. Matters dehors the record must be set up by plea. (State v. Watson, 871.)

See Fraudulent Conveyance, 1-4; Libel, 6; Mobs, 3.

PLEDGE.

PLEDGE—UNAUTHORIZED SALE OF PROPERTY—LIABILITY.—A pledgee, who makes a sale of the pledged property in a manner unauthorized by law, does not thereby lose his lien and become liable to the pledgor for the value of the property, but is liable only for such damages as the pledgor may have sustained. (Whipple v. Dutton, 501.)

See Larceny.

POLICE POWER.

1. POLICE POWER—SUBJECTS OF.—The sale of commodities may be subject to the exercise of the police power, though their use does not necessarily subvert the morals, impair the health, or disturb the peace of society. (*State v. Schuman*, 754.)

2. POLICE POWER—WHAT IS.—A LEGISLATURE, in the absence of any constitutional prohibition, may lawfully prohibit all things hurtful to the comfort, safety, and welfare of society, though the prohibition invades the right of liberty or property of an individual. This power is known as the police power of the state. (*Booth v. People*, 229.)

3. POLICE POWER—VALID REGULATION—GRAIN OPTION CONTRACTS.—A statute declaring grain option contracts to be gambling contracts, and the making of them to be a criminal offense, is a valid police regulation, for it does not deprive any person of liberty or property without due process of law or deny to him the equal protection of the law. (*Booth v. People*, 229.)

4. POLICE POWER—COMPULSORY VACCINATION—DEFENSE—QUESTION OF FACT.—While the legislature in the exercise of the police power may provide for compulsory vaccination and establish penalties for its enforcement, yet such power must be exercised in a reasonable manner, and it is a sufficient excuse for noncompliance with the law that the condition of a person's health is such that it would be dangerous to submit to vaccination; the burden of proving such a defense is upon the person who sets it up, and is a fact to be found by the jury. (*State v. Hay*, 691.)

5. POLICE POWER—COMPULSORY VACCINATION.—In the valid exercise of the police power, the legislature may authorize municipal bodies to provide for compulsory vaccination and to establish penalties for its enforcement. (*State v. Hay*, 691.)

See *Municipal Corporations*, 9-13.

PREFERENCES.

See *Bankruptcy*, 3; *Fraudulent Conveyance*, 5-8.

PRIVILEGED COMMUNICATIONS.

See *Libel*, 3-6.

PROCESS.

1. PROCESS—UNLAWFUL SERVICE OF.—An officer who breaks and enters the outer doors of a dwelling-house for the purpose of serving an ordinary writ of replevin or other civil process becomes a trespasser, especially when no question of fraud or covin is involved. (*Kelley v. Schuyler*, 887.)

2. JURISDICTION—PROCESS—PERSONAL SERVICE ON NONRESIDENT.—Personal service of process upon a nonresident, who puts himself within the jurisdiction of the foreign state is valid. But there can be no valid personal service of process from the tribunals of one state outside of its own territory. (*Hinton v. Penn Mutual Life Ins. Co.*, 636.)

3. JURISDICTION.—SERVICE OF PROCESS BY PUBLICATION may be had on a nonresident, where his property is within the jurisdiction of the court, or where it is necessary to fix the status of a nonresident as to his relations with a resident within the jurisdiction, as in divorce proceedings. (*Hinton v. Penn Mutual Life Ins. Co.*, 636.)

4. JURISDICTION—PERSONAL ACTION—SERVICE BY PUBLICATION ON NONRESIDENT.—Where an action is merely in personam, to determine the personal rights and obligations of the defendant, service by publication upon a nonresident is ineffectual for any purpose. (Hinton v. Penn Mutual Life Ins. Co., 636.)

See Appeal, 4; Jurisdiction, 2.

PUBLIC WELFARE.

See Maxims.

PUFFING.

See Auction.

QUANTUM MERUIT.

See Contracts, 1; Mistake, 5.

QUARANTINE.

See Boards of Health; County, 1, 2.

RAILROADS.

1. RAILROADS—EVIDENCE OF REPAIR OF DEFECTIVE PREMISES.—In an action against a railroad company to recover for injury caused by a defect in a depot platform, evidence that the platform was repaired and the defect removed after the accident happened is not admissible on the part of the plaintiff. (Railroad v. Wyatt, 926.)

2. RAILROADS—DEFECTIVE PREMISES—EVIDENCE.—In an action against a railroad company to recover for injury caused by a defect in a depot platform, under a declaration fully alleging the defective condition of the premises, proof of patent defects in a platform in the neighborhood of the one causing the injury and existing for a considerable time before the accident is admissible to show that the railroad company had notice of the defective condition of its platform. (Railroad v. Wyatt, 926.)

3. BARBED-WIRE FENCE—NEGLIGENTLY MAINTAINED—NUISANCE.—A railroad company, which maintains a barbed-wire fence along its right of way in such a negligent condition that it is dangerous to stock, is liable to the owner of stock injured by it, since by its location and the probability of causing injury at that place in its defective state the fence is a nuisance. (Winkler v. Carolina etc. Ry. Co., 663.)

4. RAILROADS—LIABILITY FOR STOCK KILLED—STATUTORY NOTICE.—Under a statute providing that a railroad company shall be liable to the owners of stock killed for damages resulting from failure to fence its track, "provided, however, that no action shall be maintained until such owner has given at least thirty days' notice in writing to the company," a notice including plaintiff's stock as well as stock owned jointly by himself and a third person for which he seeks to recover, and signed by both, is sufficient. Such notice is not jurisdictional. (Brown v. Southern Pac. Co., 761.)

5. RAILROADS—LIABILITY OF FIRST OF TWO RAILROADS FOR DEFECT IN CAR.—If a railroad car has passed from the control of one company into that of another, and before it reaches the place of accident it has passed a point at which the cars

are inspected, the responsibility of the first railroad company for a defect in the car which was not secret is at an end. (*Glynn v. Central R. R. Co.*, 507.)

6. **RAILROADS—DUTY TOWARD PASSENGER—PROTECTION FROM ARREST.**—A railroad company must protect its passengers from assaults, insults, and ill-treatment of their fellow-passengers, strangers, and its own servants, but it is not required to protect them from arrest by officers of the law. (*Owens v. Wilmington etc. R. R. Co.*, 642.)

7. **CARRIERS—RIGHT TO EXPEL PASSENGER—NONPAYMENT OF FARE.**—Failure of a passenger to pay the fare of a child under his care and control authorizes the expulsion of both, although both are minors. (*Warfield v. Railroad*, 911.)

8. **CONSTITUTIONAL LAW — RAILROADS — FREE TRANSPORTATION TO SHIPPERS.**—A statute requiring railroad companies to furnish free transportation to shippers of livestock in certain cases without any obligation on the part of the shipper to pay or perform anything as an equivalent for his transportation is unconstitutional and void, as a deprivation of property without due process of law, and a denial of the equal protection of the laws (*Atchison etc. Ry. Co. v. Campbell*, 328.)

See Board of Health, 4; Carriers; False Imprisonment

REAL PROPERTY.

See Crops.

RECEIVERS.

RECEIVERS — ENFORCEMENT OF STOCKHOLDER'S STATUTORY LIABILITY.—A shareholder's statutory liability for the "debts and liabilities" of a corporation is exclusively for the benefit of creditors, and is not an asset of the corporation. Hence, a receiver of an insolvent bank, unless expressly authorized by statute, cannot enforce such liability against the corporation, for he has no interest therein. The creditors alone can enforce it. (*Colton v. Mayer*, 456.)

See Setoff, 1, 2.

REDEMPTION.

See Attachment, 1; Mortgages.

REFERENCE.

TRIAL—EFFECT OF FACTS FOUND BY REFEREE.—In cases where a compulsory reference may be lawfully directed, the trial court may act upon the evidence reported by the referee, and, disregarding his findings, may find its own conclusion of facts. (*Utley v. Hill*, 569.)

REPLEVIN.

1. **REPLEVIN—RETURN OF PROPERTY.**—If plaintiff takes possession of property in replevin, and judgment is rendered for its return, plaintiff must seek defendant within a reasonable time and tender the property to him in the same condition in which it was received, to avoid liability on his bond, if the property is such that it can be readily moved; but if such course is difficult by reason of its bulky character, an offer to deliver it to the defendant is sufficient. (*Capital Lumbering Co. v. Learned*, 792.)

2. REPLEVIN—ACTION ON BOND—ESTOPPEL TO DENY VALUE.—The recital in a replevin bond of the value of the property is sufficient evidence of the value in an action on the bond, and estops the plaintiff and his sureties from denying such value. (Capital Lumbering Co. v. Learned, 792.)

3. REPLEVIN—RETURN OF PROPERTY—TENDER, TO WHOM MADE.—A tender of property in satisfaction of a judgment in replevin for its return must be made to the holder of the judgment. (Capital Lumbering Co. v. Learned, 792.)

4. REPLEVIN—ACTION ON BOND—ESTOPPEL TO DENY VALUE.—In an action against the surety in a replevin bond reciting the value of the property, he cannot deny its value though the judgment in the original action was not in the alternative, but only for the return of the property, and stating its value at the sum named in the bond. (Capital Lumbering Co. v. Learned, 792.)

5. REPLEVIN—ACTION ON BOND—DEFENSE.—It is no defense to an action on a replevin bond that it is signed by but one surety instead of two or more, as required by statute. (Capital Lumbering Co. v. Learned, 792.)

6. JUDGMENTS IN REPLEVIN—SATISFACTION.—An ordinary alternative replevin judgment may be satisfied before levy by returning the property named in the writ within a reasonable time, and in such case the defendant cannot be compelled to pay the value. (Marks v. Willis, 752.)

7. EXECUTIONS IN REPLEVIN—INJUNCTION.—If after the rendition of an alternative judgment in replevin, an execution thereon is returned unsatisfied because the officer is unable to obtain the property, this does not justify the issuance of an alias execution directing the enforcement of the alternative money judgment alone. The enforcement of such execution may be enjoined when tender of the property has been made. (Marks v. Willis, 752.)

RESCUING LIFE.

See Negligence, 4-9.

RES JUDICATA.

See Dower, 4; Judgments; Municipal Corporations, 16.

SETOFF.

1. SETOFF AGAINST RECEIVER OF INSOLVENT BANK.—If a bank becomes insolvent, a depositor therein, indebted to it on a note in a sum greater than his deposit, is entitled, as against a receiver of the bank, to set off his deposit against the amount of the note, though it did not mature until after the receiver was appointed, and without any previous demand having been made for the deposit. (Colton v. Drivers' etc. Assn., 431.)

2. SETOFF AGAINST RECEIVER OF INSOLVENT BANK—CONSTRUCTION OF STATUTE.—Notwithstanding a statute which places corporations dissolved under it on the same basis as trustees in insolvency of natural persons, a depositor in an insolvent bank has, as against a receiver thereof, a right, in equity at least, to set off his deposit against a note in the hands of the receiver, where the code of the state provides for the distribution of the estates of insolvents "according to the principles of equity." (Colton v. Drivers' etc. Assn., 431.)

3. SETOFF AGAINST RECEIVER OF INSOLVENT BANK—BONA FIDE PURCHASER.—A depositor's right to offset his de-

posit against his note to an insolvent bank, in the hands of a receiver, though such note matured after the receiver's appointment, cannot be avoided by the receiver on the theory that the latter occupies the position of a bona fide purchaser for value. (*Colton v. Drivers' etc. Assn.*, 431.)

SEWER.

See Negligence, 2.

SLANDER.

SLANDER.—A PARTNERSHIP is not liable for a slander uttered by one of its members, where the other partners did not direct the speaking of the words complained of. (*Page v. Citizens' Bank Co.*, 144.)

SMALLPOX.

See County, 2; Municipal Corporations, 4.

SPECIFIC PERFORMANCE.

1. VENDOR AND PURCHASER—SPECIFIC PERFORMANCE BY VENDOR.—Where property which is the subject of a contract of sale has been substantially damaged or materially changed between the date of the contract and the time when the vendor offers to convey, the courts will not decree a specific performance of the contract at the instance of the vendor. (*Phinizy v. Guernsey*, 207.)

2. VENDOR AND PURCHASER—SPECIFIC PERFORMANCE BY VENDEE.—When there has been a binding agreement to sell improved real estate, and before the property is conveyed the improvements thereon are destroyed by fire without the vendor's fault, a court of equity will, at the instance of the vendee, compel a specific performance of the contract, and will allow an abatement of the purchase price in such an amount as is just and reasonable in view of the changed condition of the property. (*Phinizy v. Guernsey*, 207.)

3. VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—ABATEMENT IN PRICE—HOW DETERMINED.—In a suit by a vendee for specific performance, where the improvements on the property have been destroyed by fire, the amount which the vendee should pay is determined by first ascertaining the market value at the date of the contract of the property both with and without improvements. If the value of the improved lot is greater than the contract price, the difference between these two sums represents the vendee's profit, which amount deducted from the value of the lot unimproved will be the amount the vendee is required to pay. If the value of the improved lot is less than the contract price, the difference represents the vendee's loss, which amount added to the value of the lot unimproved is the amount the vendee is required to pay. (*Phinizy v. Guernsey*, 207.)

STATUTE OF FRAUDS.

See Landlord and Tenant, 2; Pleading, 5, 6; Vendor and Purchaser.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

1. **CONSTITUTIONAL LAW—PRESENTATION OF BILL TO GOVERNOR.**—Under a constitutional provision that every bill which shall have passed both houses of the legislature shall be presented to the governor, such bill is presented when it is carried by the chief clerk of either house and offered or tendered to the governor or his secretary. It makes no difference that he does not receive it, or refuses to receive it. (State v. Michel, 364.)

2. **CONSTITUTIONAL LAW—CONSTRUCTION OF WORDS.**—Whatever doubt may exist in the judicial mind as to the proper meaning to be given to words used in a statute or constitutional provision, it is safely resolved in favor of that construction sanctioned alike by the policy of the law and the moral sentiment of the people. (State v. Michel, 364.)

3. **CONSTITUTIONAL LAW—TITLES OF STATUTES.**—The title of a statute may be either narrow and restricted or broad and general, as the members of the legislature may prefer, and whether it be in the one form or the other in a given instance, all legislation that is germane to the subject expressed in the title is within the title and permissible under it. If the title adopted be narrow and restricted, carving out for treatment only a part of a general subject, the legislation under it must be confined within the same limits, but if it be broad and general, the legislation under it may have a like scope. (State v. Schlitz Brewing Co., 941.)

4. **CONSTITUTIONAL LAW—TITLES OF STATUTES.**—It is never essential that the title of a statute shall recite the subdivisions, provisos, and exceptions appearing in its body, and the fact that they do appear without previous mention in no way affects the constitutionality of the statute, so long as they are germane to the subject expressed in the title. (State v. Schlitz Brewing Co., 941.)

5. **CONSTITUTIONAL LAW—TITLE OF STATUTE—TRUST LEGISLATION.**—The exclusion of agricultural products and livestock in the hands of a producer or raiser from the operation of a statute whose title embraces all trusts and combinations without exception does not render the statute unconstitutional as embracing in its body a subject not expressed in its title. (State v. Schlitz Brewing Co., 941.)

6. **CONSTITUTIONAL LAW—STATUTES—TITLE.**—A constitutional requirement that a statute shall have but one subject, which must be expressed in its title, is mandatory, and the legislation, to be valid, must always come within the title, whether it be narrow and restricted or broad and general. (State v. Schlitz Brewing Co., 941.)

7. **CONSTITUTIONAL LAW—STATUTES—TITLE.**—The title of a statute with the regulation of commerce or trade as its expressed subject is broad enough to include dealings in both imported and domestic commodities. (State v. Schlitz Brewing Co., 941.)

8. **CONSTITUTIONAL LAW—STATUTES—LAW OF LAND.** To entitle a statute to recognition as the law of the land on the particular subject treated therein, it must have been passed with due form and ceremony, and it must embrace equally all persons then, or who may thereafter be, in like condition, and, if class legislation, it must, in addition, be natural and reasonable in its classification, and it must conform to all other requirements of the constitution. (State v. Schlitz Brewing Co., 941.)

9. **CONSTITUTIONAL LAW—CORPORATIONS—SPECIAL LEGISLATION.**—A statute attempting to regulate the contracts of

a corporation respecting the wages of its employes, and establishing liens on all of the property of a corporation therefor, is special and arbitrary legislation against the corporation and in favor of the laborer. It infringes the right to make and enforce contracts, and denies to corporations the equal protection of law, and is unconstitutional and void. (Johnson v. Goodyear Min. Co., 17.)

10. CONSTITUTIONAL LAW—CORPORATIONS—SPECIAL LEGISLATION—ARBITRARY CLASSIFICATION.—Corporations cannot be made the basis of classification for purposes of legislation, unless such classification is founded upon some constitutional or natural distinction suggesting a reason justifying the diversity of legislation respecting them. Arbitrary selection is not justified by calling it classification, and there is no reason why a corporation should have its property subjected to a lien unless the property of other persons, under like circumstances, is subject to the same kind of lien, or why it should be prohibited from making defenses which others may make. A statute requiring corporations to pay attorneys' fees in an action from which others are exempt, and forbidding them and their employes from making contracts which others may make, is unconstitutional. (Johnson v. Goodyear Min. Co., 17.)

11. CONSTITUTIONAL LAW—CORPORATIONS—SPECIAL LEGISLATION.—Statutes restricting the contracts or business of foreign corporations cannot be upheld to the extent of altering, amending, or repealing their charters existing under the laws of other states. (Johnson v. Goodyear Min. Co., 17.)

12. CONSTITUTIONAL LAW—TRUST LEGISLATION—CLASS LEGISLATION.—If the title of a statute embraces all trusts and combinations, a provision in the statute excluding agricultural products and livestock in the hands of the producer from its operation does not render the statute void as vicious class legislation. Such classification is not arbitrary and capricious, but natural and reasonable. (State v. Schlitz Brewing Co., 941.)

13. CONSTITUTIONAL LAW.—A STATUTE AUTHORIZING THE "COURT" to impose a fine and imprisonment for its violation is not unconstitutional as undertaking to confer power upon the "judge" of the court not possessed by him under the constitution. In such case the word "court" refers to the court and jury, and not to the "judge." (State v. Schlitz Brewing Co., 941.)

14. CONSTITUTIONAL LAW—RESTRICTION ON RIGHT TO CONTRACT.—ANTI-TRUST STATUTES are not unconstitutional simply because they restrict and regulate the right to contract. The right of contract is a part of both the right of property and the right of liberty, but it is subject to legislative restriction and control. (State v. Schlitz Brewing Co., 941.)

15. CONSTITUTIONAL LAW—STATUTES—CONSTRUCTION. Statutes regularly passed, when attacked as unconstitutional, are entitled to the benefit of every reasonable doubt, and, if susceptible of two meanings, that one must be adopted, though the less plausible, which reconciles it to the constitution, rather than another which makes it conflict therewith. (State v. Schlitz Brewing Co., 941.)

16. CONSTITUTIONAL LAW—POLICY OF LEGISLATION.—The wisdom, policy, and expediency of a statute is purely a question of legislative discretion not reviewable by the courts. (State v. Schlitz Brewing Co., 941.)

17. CONSTITUTIONAL LAW.—A STATUTE should be held to be unconstitutional only when clearly violative of some provision of the organic law which has restrained the legislative power. (State v. Hay, 691.)

18. CONSTITUTIONAL LAW—WHAT ACTS MAY BE MADE CRIMINAL.—The state may deprive a citizen of liberty or property by "due process of law," which phrase is synonymous with "law of the land." Hence the law of the land may expressly prohibit and make criminal the doing of an act which, in the absence of such law, would constitute a liberty or property right within the meaning of the constitution, even though such act is not within itself immoral. (Booth v. People, 229.)

19. A STATUTE DECLARING GRAIN OPTION CONTRACTS TO BE GAMBLING CONTRACTS, and the making of them to be a criminal offense, is not unconstitutional on the ground that it fails to embrace all kinds of personal property. The act need not embrace all contracts to buy or sell, but only all of such contracts as lie at the root of the evil which threatens the public safety and welfare; and when it does this, it does not deny to any person the equal protection of the law. (Booth v. People, 229.)

See Penalty.

SUCCESSION.

See Descent.

SUCCESSION TAX.

See Taxes.

SUNDAY.

See Time, 2-4.

SURETYSHIP.

1. SURETYSHIP—FORTHCOMING BONDS.—If a claimant of personalty levied upon is allowed to retain possession thereof upon giving the officer a bond with surety conditioned "to have the said described personal property forthcoming to answer the final judgment of the court," and the property is subsequently found liable, the principal and surety are liable if they fail to comply with the conditions of such bond, and are not relieved therefrom by afterward delivering the property to the officer upon a regular forthcoming bond given in another case arising upon the levy of a junior execution, and the fact that the plaintiff in the senior execution, after obtaining judgment on the first bond, does not seek to have the proceeds of the property sold under the junior execution applied to the senior execution, or object to the application made of such proceeds, does not afford sufficient reason for discharging such surety on the trial of an appeal of a judgment against his principal and himself on the bond. (Reese v. Worsham, 109.)

2. SURETYSHIP—JUDGMENT AGAINST SURETIES—ELECTION OF PROCEDURE.—A portion of the sureties upon a guardian's bond who have paid a judgment against the guardian and all of the sureties may enforce contribution from the remainder of the sureties by proceeding against them in the manner provided by statute, or they may take a written assignment of the judgment from the plaintiff therein upon payment thereof, and enforce it in his name by execution against each of the other sureties for his proportionate share of the debt. (Williams v. Riehl, 60.)

3. JUDGMENTS—JOINT DEBTORS—SATISFACTION.—The mere payment of a judgment by one joint debtor does not operate

as an accord and satisfaction as to other joint judgment debtors, unless it plainly appears that the payment was to have that effect. This rule is here applied to cosureties. (Williams v. Riehl, 60.)

4. SURETYSHIP—CONTRIBUTION—INDEMNITY.—A surety holding indemnity, who has paid the debt of his principal, can maintain an action against his cosurety for the sum he is then entitled to as contribution, regardless of the indemnity. (Williams v. Riehl, 60.)

5. SURETYSHIP—CONTRIBUTION.—If a surety pays a judgment against his principal and takes a written assignment thereof, he can enforce it against any other cosurety only for his aliquot part of the debt based on the whole number of sureties, and execution on such judgment cannot be allowed against any surety for an amount in excess of his legal proportion of the debt. (Williams v. Riehl, 60.)

6. SURETYSHIP—PRESUMPTION OF SOLVENCY.—In an action by one surety to enforce contribution from his cosureties, it is presumed that all of the sureties are solvent, and if some of them are insolvent equity will place the burden equally upon the solvent sureties. (Williams v. Riehl, 60.)

See Bonds; Officers, 4-7; Judgment, 2.

SURVIVORSHIP.

See Actions; Descent.

TAXES.

1. ESTATES OF DECEDENTS—COLLATERAL INHERITANCE TAX—PERSONAL PROPERTY—CONFLICT OF LAWS. Stocks and bonds of foreign corporations, including bonds secured by mortgage, situated in one state, but owned by a resident of another state, are for the purposes of taxation treated as having a situs at the domicile of their owner, and upon the death of such owner are subject to the payment of a collateral inheritance tax imposed by the law of the domicile. (Frothingham v. Shaw, 475.)

2. ESTATES OF DECEDENTS—CONFLICT OF LAWS—SUCCESSION TAX.—Legacy and succession duties as such are payable at the place of domicile in respect to movable property wherever situated, since the succession or legacy takes effect by virtue of the law of the domicile. (Frothingham v. Shaw, 475.)

TELEGRAPH COMPANY.

1. TELEGRAPH COMPANIES—LIABILITY FOR NONDELIVERY.—A telegraph company, which receives a message for delivery and fails to deliver it with reasonable diligence, becomes prima facie liable, and the burden rests upon it of alleging and proving such facts as it relies upon to excuse its failure. (Hendricks v. Western Union Tel. Co., 658.)

2. TELEGRAPH COMPANIES—DELAY IN DELIVERY—LIABILITY.—The failure of a telegraph company to deliver a message within a reasonable time is equivalent to nondelivery, so far as the principle of liability is concerned, although the length of the delay may in certain cases affect the quantum of damages. (Hendricks v. Western Union Tel. Co., 658.)

3. TELEGRAPH COMPANIES—RULES—NOTICE TO SENDER OF MESSAGE.—A rule of a telegraph company relating to the delivery of messages, made without notice to those who are to be

affected by it, and which is not observed by the company itself, affords no protection against liability for failure to deliver. (*Hendricks v. Western Union Tel. Co.*, 658.)

4. **TELEGRAPH COMPANIES—NOTIFYING SENDER OF NONDELIVERY OF MESSAGE—NEGLIGENCE.**—It is the duty of a telegraph company, in all cases where it is practicable to do so, to promptly inform the sender of a message that it cannot be delivered. A failure to do so is evidence of negligence, though it may not be negligence per se. (*Hendricks v. Western Union Tel. Co.*, 658.)

5. **TELEGRAPH COMPANIES—LIABILITY FOR FALSE ASSURANCE OF DELIVERY OF MESSAGE.**—Even if a telegraph company is not guilty of negligence in failing to deliver a telegram, this does not relieve it from liability for its negligent assurance that it had been delivered. (*Laudie v. Western Union Tel. Co.*, 668.)

6. **TELEGRAPH COMPANIES—FALSE ASSURANCE OF DELIVERY OF MESSAGE.**—The assurance of a telegraph company, false in fact, though not in intention, that a telegram had been delivered, is actionable negligence, and the injured party can recover such damages as directly result therefrom. (*Laudie v. Western Union Tel. Co.*, 668.)

7. **TELEGRAPH COMPANIES—DUTY—DELIVERY OF MESSAGE.**—It is the duty of a telegraph company, in all cases when it is practicable to do so, to promptly inform the sender of a message that it cannot be delivered; a failure to do so is evidence of negligence, though it may not be negligence per se. (*Laudie v. Western Union Tel. Co.*, 668.)

TELEPHONE COMPANY.

1. **TELEPHONE COMPANIES—NEGLIGENCE—AUTHORITY OF EMPLOYEES.**—If a telephone company knowingly permits its employes over its own lines to make arrangements contrary to instructions with customers, in ascertaining from such employes the cost of delivery of a message beyond the terminus of the line, and there collecting from the customer compensation for the entire work, then the fact that under its arrangement with its employes and distant operators they are to receive the pay for the delivery beyond the terminus can make no difference, so far as the customer is concerned, and the negligence of such operator, if proven, is the negligence of the company. (*Telephone Co. v. Brown*, 906.)

2. **TELEPHONE COMPANIES—AUTHORITY OF AGENT.**—No instructions of a telephone company to its operators, however formal and peremptory, can prejudice the rights of a customer, if it knowingly permits such agents to conduct its affairs upon a plan in direct conflict with such instructions. The course of business actually pursued by the company's agents with its knowledge is the proper and legal criterion of its responsibility to its customers. (*Telephone Co. v. Brown*, 906.)

3. **TELEPHONE COMPANIES—DUTY TO DELIVER MESSAGES.**—If a telephone company or its operator receives a message for delivery beyond its terminus, the duty to deliver promptly is absolute, and the operator has no right to speculate as to the probable effect of promptness or delay in delivering the message. (*Telephone Co. v. Brown*, 906.)

4. **TELEPHONE COMPANIES—DELAY IN DELIVERING MESSAGE—DAMAGES.**—In order for a father to recover for being deprived of seeing his daughter before her death, caused by the negligent delay of a telephone company in delivering a message

received for transmission, he must prove that he both could and would have arrived and been with his daughter at the time of her death if the message had been delivered promptly. (*Telephone Co. v. Brown*, 906.)

TIMBER.

See Trespass, 1.

TIME.

1. **DAY—COMPUTATION OF TIME.**—A day, in the computation of time, begins at 12 o'clock midnight and extends through twenty-four hours to the next 12 o'clock midnight. (*State v. Michel*, 364.)

2. **TIME—COMPUTATION OF—SUNDAY.**—If a limitation of time is fixed within which a particular act or thing is to be done, if done at all, after which performance would be without effect, and if the time exceeds one week, an intervening Sunday is to be included in the computation; if less than a week, Sunday is to be excluded. (*State v. Michel*, 364.)

3. **TIME—COMPUTATION OF—SUNDAY.**—If the time stipulated within which an act must be done does not necessarily include Sunday, that day is excluded from the computation without express mention of the fact. If the time stipulated must necessarily include Sunday, that day is not excluded from the computation, unless there is an express declaration to that effect. (*State v. Michel*, 364.)

4. **TIME—COMPUTATION OF—SUNDAY.**—If one of the five days accorded the governor by the constitution in which to return a bill to the legislature with his objections happens to be Sunday, or a legal holiday, that day is not to be computed as one of the five days. (*State v. Michel*, 364.)

5. **CONSTITUTIONAL LAW—COMPUTATION OF TIME.**—Under a constitutional provision that if any bill passed by the legislature shall not be returned by the governor "within five days after it shall have been presented to him it shall be a law," the day on which such bill is presented to the governor is not to be included in the computation of the five days, but the last day of the specified period is to be computed. (*State v. Michel*, 364.)

TORTS.

1. **TORTS.—LIABILITY OF TORT FEASORS** for the same tort is joint and several. They may be sued jointly or severally, and judgment recovered against one of them remaining unsatisfied is no bar to an action against the other for the same tort. (*Grundel v. Union Iron Works*, 75.)

2. **TORTS.—LIABILITY OF TORT FEASORS.**—In an action to recover for death caused by the wrongful act of several defendants, the fact that part of them availed themselves in a federal court of the limited liability fixed by federal statute, and that plaintiff appeared therein to claim damages, is no bar to his right to maintain suit in the state court against the other tort feors while the action is pending in the federal court, provided he has not received satisfaction in any form or amount. (*Grundel v. Union Iron Works*, 75.)

See Infants, 1; Joint Liability, 1, 2.

TRESPASS.

1. **TRESPASS—CUTTING TIMBER—EVIDENCE.**—Evidence of the purchase of timber from the person occupying the land, and

his declaration of his right to sell it, is admissible to show the good faith of the purchaser, in an action against him by the owner to recover the statutory penalty for cutting such timber. (Haley v. Taylor, 549.)

2. TRESPASS—COTENANCY—DEFENSE COMMON TO ALL. The right of cotenants to sue in trespass to recover the statutory penalty for cutting timber on their land is joint, and whatever constitutes a good defense as to one of them is good as against all. (Haley v. Taylor, 549.)

See Conflict of Laws, 2; Cotenancy, 2; Officers, 6.

TRIAL.

1. TRIAL—WITHDRAWING JUROR.—The practice of withdrawing a juror in a civil case for the purpose of postponing the trial does not obtain in Oregon. (Usborne v. Stephenson, 778.)

2. TRIAL—WITHDRAWING JUROR.—The only cause for withdrawing a juror in a civil case is surprise on the trial, and a motion therefor cannot be based on matters happening prior thereto. (Usborne v. Stephenson, 778.)

3. JURY TRIAL.—A jury has, in all cases, the constitutional right to pass upon the weight and credibility of the testimony. (Hendricks v. Western Union Tel. Co., 658.)

4. TRIAL—FACTS FOUND BY JURY—PRESUMPTION.—Where issues of fact or questions of mixed law and fact are properly submitted, and there is conflicting evidence sufficient to go to the jury, the court will assume as proved all facts found by their verdict either directly or by necessary implication. (Laudie v. Western Union Tel. Co., 668.)

See Instructions; Negligence, 10; Reference.

TRUSTS.

1. TRUSTS—TRUSTEE BARRED, WHEN BENEFICIARIES NOT.—The doctrine that where the trustee is barred the beneficiary is also barred does not apply where the trustee, who has a bare, legal title, conveys such title to another, in accordance with a provision of the trust, and at his death there was nothing to descend to his heirs. (Fleming v. Barden, 671.)

2. TRUSTS AND TRUSTEES—LIABILITY FOR PROFITS.—A trustee is liable for all profits made on the trust funds in his hands, and evidence is admissible to show that he loaned such trust funds at a usurious rate of interest. (Teasley v. Bradley, 118.)

See Monopolies.

USURY.

CONTRACTS—USURY—EXTENSION OF TIME.—The usurious payment of interest is a good consideration to support a contract to extend the time of payment of a debt secured by a mortgage. (Fleming v. Barden, 671.)

VACCINATION.

See Police Power, 4, 5.

VENDOR AND PURCHASER.

STATUTE OF FRAUDS—PAROL SALE OF LAND—BREACH—RECOVERY FOR IMPROVEMENTS.—A purchaser of real estate by parol may have compensation for improvements placed on the land, but damages cannot be recovered for the non-performance of such a contract. (*Jordan v. Greensboro Furnace Co.*, 644.)

See Insurance, 8, 9; Specific Performance, 1-3.

WAGES.

See Assignment.

WARRANT.

See Arrest; False Imprisonment, 1-3; Interest, 1-3.

WATERS AND WATERCOURSES.

1. WATERS AND WATERCOURSES.—NAVIGABLE RIVERS ARE PUBLIC HIGHWAYS, subject to public use, and the right of passage over them extends to all parts of their channels, and any obstruction thereof is a public nuisance. (*Pascagoula Boom Co. v. Dixon*, 537.)

2. WATERS AND WATERCOURSES—OBSTRUCTION—INJUNCTION.—Booms for logs which prevent the speedy passage of rafts and logs down a navigable stream must have legislative warrant for their construction. Otherwise they are a nuisance, and their construction may be enjoined by a person suffering special damage. (*Pascagoula Boom Co. v. Dixon*, 537.)

3. WATERS—DEFINITION.—"RELICTION" is the term applied to land made by the recession of the water by which it was previously covered. (*Hammond v. Shepard*, 274.)

4. WATERS—RELICTION—OWNERSHIP.—If an addition to land, by reliction, takes place suddenly and sensibly, the ownership remains according to former boundaries; but if it is made gradually and imperceptibly, the derelict or dry land belongs to the riparian owner from whose shore or bank the water has receded. (*Hammond v. Shepard*, 274.)

5. WATERS.—SHORE OWNERS ON MEANDERED LAKES, whether navigable or non-navigable, take title only to the water's edge as title to the bed of such lakes is in the state. (*Hammond v. Shepard*, 274.)

6. WATERS—ACCRETION, OR RELICTION—APPORTIONMENT.—To take land by accretion or reliction, a shore owner on a meandered lake must make it appear that the addition to his shore was made by slow and imperceptible processes; and if two or more persons own the shore from which the water has receded, the new land must be apportioned between them according to the extent of their shore line. (*Hammond v. Shepard*, 274.)

7. WATERS—MEANDERED LAKES—RELICTION—DEPRIVING THE STATE OF TITLE.—No shore owner on a meandered lake can deprive the state of its title to the former bed thereof without establishing, by proof, that the dry land was formed by the water receding from his shore line, whether it took place suddenly or gradually. (*Hammond v. Shepard*, 274.)

WILLS.

1. WILLS—CONSTRUCTION—REPUGNANT CONDITIONS.—If an estate in fee is devised, and the testator attempts by a condition in the will to prevent its alienation except by will, the estate passes in fee to the devisee free of such condition, as well as free of a condition in the will against liability for the devisee's debts. Such conditions are repugnant to the estate granted and void. (Kaufman v. Burgert, 813.)

2. WILLS—RESIDUARY CLAUSE—CONSTRUCTION OF—INTENTION OF TESTATOR.—In Ohio, there is no distinction made between the effect of a residuary clause in a will with respect to void and lapsed devises of realty and such bequests of personalty, because, in that state, both real and personal property, of which no disposition is made by will, go to the next of kin. Hence, in all cases, the intention of the testator must control, which is to be ascertained from his situation at the time of the execution of the will and from a consideration of all of its provisions. (Davis v. Davis, 725.)

3. WILLS—RESIDUARY CLAUSE—CONSTRUCTION OF—VOID AND LAPSED LEGACIES.—There can be no proper application of the rule that a residuary clause carries all the estate of the testator not otherwise lawfully disposed of by the will, including void and lapsed legacies, when a different intention may be fairly drawn from all the provisions of the will. (Davis v. Davis, 725.)

4. WILLS—RESIDUARY CLAUSE—HOW CONSTRUED, IF IT HAS TWO APPLICATIONS.—If the language of a testator, in the residuary clause of his will, admits of a limited application, as well as one of a more general character, it should be given that construction most favorable to the heir at law. (Davis v. Davis, 725.)

5. WILLS—RESIDUARY CLAUSE—VOID CHARITABLE REQUESTS ARE SUBJECT TO STATUTES OF DESCENT.—When the residuary clause of a will, which does not purport to dispose of the general residuum of the testator's property, provides that "the balance" of a particular fund, derived from certain specified sources, shall, after the payment of debts, and certain charitable legacies, which have become void from the happening of an unexpected event, be divided among persons named, that "balance" is only what is left after taking from the fund the amount of the charitable bequests. Hence, the amount of the charitable legacies does not pass under the residuary clause, but goes to the heirs, under the statutes of descent and distribution, as undisposed of property. (Davis v. Davis, 725.)

6. WILLS—CHARITABLE REQUESTS OR DEVISES—STATUTE INVALIDATING—OBJECT AND EFFECT OF.—A statute which invalidates a legacy or devise to any benevolent, religious, educational, or charitable purpose, where the testator dies, leaving children or an adopted child, unless the will was executed, according to law, at least one year prior to the decease of the testator, is designed for the special protection of the children or adopted child of the testator and their representatives, though it inures also to the benefit of the collateral heir when the lineal heir survives the testator and then dies. (Davis v. Davis, 725.)

7. WILLS—DELUSIONS on the part of a testatrix, though without foundation, that her sons had defrauded her are not sufficient ground to set aside her will passing over such sons. They still have the burden of proof to show not only that the testatrix

was laboring under such delusions at the time she made the will, but also that the will was the result of such delusions, before a court is justified in setting aside the will therefor. (Hemingway's Estate, 815.)

8. **WILLS—DELUSIONS.**—An unfounded delusion on the part of a testatrix that her sons had defrauded her is not sufficient ground to set aside her will excluding them, if it appears that the testatrix before her death sought a reconciliation with her sons, but that they neglected her, of which she complained to others. (Hemingway's Estate, 815.)

9. **WILLS—PROOF OF—SECONDARY EVIDENCE.**—If an original will cannot, for any cause, be produced in court, its execution and contents may be proved by secondary evidence, and it may be admitted to probate on such evidence. (Pratt v. Hargreaves, 551.)

10. **WILLS—PROOF OF—SECONDARY EVIDENCE.**—If a person while domiciled in one state makes what is termed by the law of that state a valid nuncupative will by notarial act, and by such law made a public record not to be taken out of the state, and such person subsequently removes to, becomes a citizen of, and dies in another state, the will may be admitted to probate in the latter state upon the production and presentation of a duly authenticated copy thereof from the records of such other state. (Pratt v. Hargreaves, 551.)

11. **WILL—REVOCATION—REMOVAL OF TESTATOR.**—If a valid will is made in one state, the removal of the testator to another state, and his becoming domiciled therein, do not revoke the will. (Pratt v. Hargreaves, 551.)

12. **WILLS—ESTOPPEL TO CONTEST—RETURN OF BENEFITS.**—A legatee under a will who accepts a legacy in ignorance of his rights in the premises may, upon the discovery of such rights, and upon the return or offer to return what he has received under the will, proceed to contest its validity and to assert his rights in the estate under the law. (Medill v. Snyder, 307.)

13. **WILLS—CONTEST—FINDINGS OF TRIAL COURT CONCLUSIVE.**—The credibility of witnesses and the probative force of the facts as to testamentary incapacity in a contest of a will are for the determination of the trial court, and if it appears that there was legal evidence to support such court's findings, the question is not open to further consideration on appeal. (Medill v. Snyder, 307.)

14. **WILLS—CONTEST—FINDINGS OF JURY.**—In an action contesting the validity of a will, the court may call a jury, and may accept or adopt its findings in whole or in part, or it may ignore them and upon independent consideration of the evidence make findings of its own. If the latter course is pursued and judgment rendered accordingly, the errors of the jury become immaterial. (Medill v. Snyder, 307.)

See Deed, 2; Descent; Executors and Administrators.

WITNESSES.

1. **WITNESSES—COMPETENCY OF CHILD.**—When a witness is called, and it is objected that by reason of insanity or youthfulness he does not understand the nature of the oath, and is therefore incompetent, it is the duty of the judge to examine into the question of his competency, and to reject him unless he is satisfied he is competent. (Commonwealth v. Reagan, 496.)

2. WITNESSES—EVIDENCE TO SUPPORT CHARACTER.—If a witness is assailed on cross-examination by questions calculated to impeach his veracity and question his truthfulness, he may introduce evidence to sustain his general character. (*Warfield v. Railroad*, 911.)

3. WITNESSES — EXPERT — QUALIFYING — VALUE OF LAND.—Ordinarily, the proper way to qualify one as a witness to value of property, is to show that he is familiar with sales of similar property and the prices paid therefor. (*Cochrane v. Commonwealth*, 491.)

4. EVIDENCE—OPINIONS OR CONCLUSIONS drawn from the statements of third persons, and not being those of an expert upon a proper subject for expert testimony, are inadmissible as original evidence for either party, and cannot be made the basis for impeaching a witness; but the answer in respect thereto, if permitted, is conclusive upon the party calling for it. (*Brown v. Odell*, 914.)

5. EVIDENCE—HYPOTHETICAL QUESTIONS may be based upon any assumption of facts which the testimony tends to prove, according to the theory of the examining counsel. (*Medill v. Snyder*, 307.)

See Evidence; Marriage and Divorce, 11.

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